





# San Francisco Law Library

No. ....

Presented by

.....

\_\_\_\_\_

## EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.



















56  
No. 2618

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

K. V. KRUSE and R. BANKS, co-partners doing  
business under the firm name of Kruse &  
Banks Shipbuilding Company, on behalf of  
themselves and their underwriters,

*Appellants,*

VS.

M. J. SAVAGE, EDW. J. MORSER, JAMES H.  
HARDY, INC., JAMES H. HARDY, HANS  
MICHELSON, MRS. F. RULFS and DR. ALEX-  
ANDER WARNER, claimants of the American  
steamer "Hardy", her tackle, apparel and  
furniture,

*Appellees.*

## APPELLEES' REPLY TO APPELLANTS' PETITION FOR A REHEARING.

Filed

FEB 19 1916

W. S. ANDREWS,  
*Proctor for Appellees.* *F. D. Monckton,*  
Clerk.

*Filed this.....day of February, 1916.*

*FRANK D. MONCKTON, Clerk.*

*By.....Deputy Clerk.*







No. 2618

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

K. V. KRUSE and R. BANKS, co-partners doing  
business under the firm name of Kruse &  
Banks Shipbuilding Company, on behalf of  
themselves and their underwriters,

*Appellants,*

VS.

M. J. SAVAGE, EDW. J. MORSER, JAMES H.  
HARDY, INC., JAMES H. HARDY, HANS  
MICHELSON, MRS. F. RULFS and DR. ALEX-  
ANDER WARNER, claimants of the American  
steamer "Hardy", her tackle, apparel and  
furniture,

*Appellees.*

## APPELLEES' REPLY TO APPELLANTS' PETITION FOR A REHEARING.

---

The appellants herein having filed and served upon us a petition for a rehearing in the above entitled matter, we are taking the liberty of replying thereto.



Appellants ask for a rehearing on the ground that their "case has not had full consideration and a vital point has been overlooked" (p. 5). This point, which appellants say this "court must have forgotten", is, that the "Hardy" was unseaworthy for not having sufficient fuel oil on board when she left Coos Bay for San Francisco. Appellants abandon their charge of negligence, that the "Hardy" should have searched for the barge longer than 11 hours, even though at 11:15 a. m. on September 7th there only remained 60 barrels of fuel oil on board (Pet. p. 4). They contend, however, that the decision of this court and of the lower court that the condition of the fuel supply justified the "Hardy" in discontinuing further search did not absolve it from the charge of negligence of not having started with sufficient supply of fuel oil, and of being unseaworthy in that particular.

It is difficult to follow appellants' reasoning and to understand their contention that the decision of this court, or of the lower court, "ignores the vital contention" that the "Hardy" was unseaworthy for lack of fuel oil. Obviously, the defense that the search was discontinued for lack of fuel oil would be untenable if in fact the "Hardy" was not properly supplied and did not have a reasonable amount of oil on board when she left Coos Bay. In finding that the "Hardy" was "not negligent in failing to keep up a longer search for the barge" the court necessarily was of the opinion that the "Hardy" was properly equipped in this regard

when she left Coos Bay. There is therefore no basis for the contention that a point to which counsel devoted six pages of their brief was forgotten or ignored.

As a matter of fact, the evidence establishes that the "Hardy" had a proper and reasonable supply of fuel oil on board. The chief engineer testified that he considered 130 to 140 barrels of oil to be an ample amount for the "Hardy" to carry in making the voyage from Coos Bay to San Francisco (Tr. p. 158), and though counsel for appellants would lay great stress on Captain Michelson's statement that he considered it prudent to carry between 260 to 280 barrels on each trip, he was clearly referring to the *round trip* from San Francisco to Coos Bay and return. The captain's estimate was just twice that of the engineer's, and they could not reasonably be so far apart in their estimates except on the basis that the captain was referring to a round trip. The "Hardy" uses 42 barrels of fuel oil every 24 hours or  $1\frac{3}{4}$  barrels every hour (Tr. p. 137). She had been making a regular run between Coos Bay and San Francisco week after week over a period of many months and in all that time the longest voyage between Coos Bay and San Francisco, made in very heavy wind and sea, had consumed only 72 hours (Tr. p. 137). Even on that hard voyage, therefore, 126 barrels of oil was sufficient. Yet the voyage involved in this action was made in 61 hours (Tr. p. 21) and if 11 hours had not been lost in searching for the barge it would



have been made in 50 hours. The "Hardy" must have had on board on this trip when she left Coos Bay at least 134 barrels of oil, or 8 more than was required on the slowest of any of her previous voyages. While there is no direct testimony that she had this amount of oil, the evidence demonstrates it to be the fact. At 11:15 a. m. on September 7th the "Hardy" had been at sea  $42\frac{1}{4}$  hours and though from 12:40 a. m. to 6 a. m. on September 7th she had been going northward at only half speed, still she had been bucking a northwest wind and sea and so consumed as much oil at half speed as if she had been running at full speed before the wind.

Up to 11:15 a. m. on September 7th the "Hardy", at the rate of 42 barrels per day, or  $1\frac{3}{4}$  barrels per hour, had used on that trip 74 barrels. It was at 11:15 a. m. on September 7th that the chief engineer, K. Knudson, sounded the tanks and found that there still remained about 60 barrels of fuel oil (Tr. pp. 137, 155). Hence the "Hardy" must have had on board when she left Coos Bay at least 134 barrels of fuel oil, which was, as stated before, 8 barrels more than had been required on the slowest and worst of her previous trips.

Nor can it be said that more oil should have been carried because of towing the barge, for appellants themselves testified that the barge was easy to tow (Tr. p. 68) and the engineer, whose testimony is cited with approval by appellants (App. Brief, pp.

16, 25), testified that the barge “didn’t make any difference to the speed” of the ship (Tr. p. 154).

The “Hardy” made the entire trip in 61 hours, and 11 hours of that period were used in searching for the barge. The fact that the trip, which was a rough one, was made in 61 hours, that 11 hours of this time were consumed in searching, and that the “Hardy” still had 15 available barrels of oil left when she reached San Francisco (Tr. p. 156) proves conclusively that she was sufficiently well supplied with oil and cannot be called unseaworthy in this regard. The “Hardy” spent 11 hours searching and, as matters turned out, could have spent 8 hours more searching and yet have come safely to port. For she had 15 available barrels of oil left when she reached San Francisco (Tr. p. 156), and on that she could have run another 8 hours. When a ship is equipped with enough oil to run it 19 hours more than is required to make a *coastwise* trip under adverse conditions, it is difficult to see how she can be said to be unseaworthy for lack of oil. Appellants would have the “Hardy” unseaworthy if she did not have enough oil on board to continue this search until the barge was found, no matter how long it took. If the “Hardy” had known how near the barge she was at 11:15 a. m. she undoubtedly, as her previous efforts demonstrate, would have continued the search and found her. But she had already spent 11 hours searching the waters where the barge was likely to be found, without success. At 11:15 Captain Michelson was sure he was south



of the barge, as he actually was. Every mile north meant another mile on return. There was no certainty when or where the barge was, or but that it might already have run ashore. There still remained 145 miles to go, and to meet emergencies that might arise on the remainder of the trip the "Hardy" had about 15 available barrels of oil more than was actually used to complete the trip. Both the captain and the engineer considered that safety demanded that they keep this margin of oil untouched. It was the fact that there were still 145 miles to go (Tr. p. 56) and that emergencies might still arise, that made it necessary and prudent for the "Hardy" not to use up any more oil in searching, but to proceed for home.

The second and last ground advanced by appellants for granting a rehearing is set forth on page 6 of their petition in a *footnote*! It is contended that "the lack of enough fuel oil to take the 'Hardy' to San Francisco was not the proper criterion of her right" to discontinue searching for the barge while near Fort Bragg. This contention is absolutely unjustifiable and has no place in this court. There is not a word in the record to indicate that the "Hardy" could have gotten into the port of Fort Bragg or could safely have moored there. Fort Bragg is not a "safe port", as counsel says, but is an outside port subject to the peril of wind and sea at all times, and only steamers equipped with heavy lines and auxiliary anchors and chains can safely anchor there. There is nothing in the

record to show that the "Hardy" had such an equipment, as in fact she had not, for she cleared only between San Francisco and Coos Bay, and no extraordinary equipment is required by the Federal Inspectors unless the clearance is for outside ports. There is not a shred of evidence to show that fuel oil was obtainable at Fort Bragg, or if obtainable, that it could have been secured before the barge went ashore. In fact, the record is absolutely silent on the question of the possibility of the "Hardy" going to Fort Bragg, and of course any statement by counsel on the subject is improper.

The evidence, then, clearly establishes that the "Hardy" was amply supplied with fuel oil when it left Coos Bay and was not unseaworthy. That appellant's contention in this particular, though in our opinion without merit, was not "forgotten" or "ignored" by this court is clearly shown by the finding that the "Hardy" was not negligent in failing to pursue its search. For abandonment on the ground of lack of oil would be no excuse if the "Hardy" was not reasonably supplied with oil when she left Coos Bay.

Dated, San Francisco,  
February 17, 1916.

Respectfully submitted,

W. S. ANDREWS,  
*Proctor for Appellees.*





No. 2618

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

K. V. KRUSE and R. BANKS, copartners, doing  
business under the firm name of Kruse & Banks  
Shipbuilding Company, on behalf of themselves  
and their underwriters,

*Appellants,*

vs.

M. J. SAVAGE, EDW. J. MORSER, JAMES H. HARDY,  
INC., JAMES H. HARDY, HANS MICHELSON, MRS.  
F. RULFS and DR. ALEXANDER WARNER, claimants  
of the American steamer "Hardy", her tackle,  
apparel and furniture,

*Appellees.*

## APPELLANTS' PETITION FOR A REHEARING.

E. B. McCLANAHAN,

S. H. DERBY,

Merchants Exchange Building, San Francisco,

*Proctors for Appellants  
and Petitioners.*

Filed this ..... day of February, 1916.

FRANK D. MONCKTON, Clerk.

By ..... F. D. Monckton, Deputy Clerk.





No. 2618

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

K. V. KRUSE and R. BANKS, copartners, doing  
business under the firm name of Kruse & Banks  
Shipbuilding Company, on behalf of themselves  
and their underwriters,

*Appellants,*

vs.

M. J. SAVAGE, EDW. J. MORSER, JAMES H. HARDY,  
INC., JAMES H. HARDY, HANS MICHELSON, MRS.  
F. RULFS and DR. ALEXANDER WARNER, claimants  
of the American steamer "Hardy", her tackle,  
apparel and furniture,

*Appellees.*

## APPELLANTS' PETITION FOR A REHEARING.

---

*To the Honorable Judges of the United States Circuit  
Court of Appeals for the Ninth Circuit:*

The appellants herein respectfully petition for a re-hearing of the above cause upon the following grounds:

1. That the court, in its decision, apparently overlooked the main point argued by the appellants, to wit:



that the only excuse offered by appellees for the desertion of appellants' barge by the steamer "Hardy", *even if true*, rendered said steamer "Hardy" unseaworthy for her voyage, and hence made her liable to appellants.

2. That the court's *sole reason* for its decision, namely: that the state of the record was not such as to justify the reversal of the lower court on *disputed* questions of fact, has no application to the point made above in that said point was and is expressly predicated on the assumption that all appellees' testimony in regard to the same is *true*.

---

### Argument.

The court's decision in this case divides itself into four parts:

a. A statement of the facts, which we do not now dispute;

b. A statement as to the law of towage, which we do not now dispute;

c. A statement of the findings made by the lower court;

d. The court's reasons for accepting these findings.

The fourth part of the above is all that we are now concerned with. It reads as follows:

"While there are many features of the evidence which tend to discredit the testimony of the officers and men of the Hardy, and tend to prove that

on the night of the fifth or during the daylight of the sixth the lantern on the barge might have been lighted without danger to the men, and that in fact no watch was kept of the barge on the night of the sixth, we are not convinced that the record is such as to take the case out of the well settled rule which has been followed by this and other courts, that in cases on appeal in admiralty, *when questions of fact are dependent upon conflicting testimony*, the decision of the District Judge who had the opportunity to see the witnesses and judge of their appearance, manner and credibility will not be reversed unless it clearly appears to be against the weight of the evidence.” (Italics ours.)

It is thus very apparent that the court decided this case solely upon the ground that it would not reverse the lower court on *disputed questions of fact*. The court, however, apparently overlooked the fact that the main point in the case *presented no disputed question of fact*, and hence the reasoning of the court is inapplicable to said point.

On page 21 of our brief the following appears:

“V.

THE ‘HARDY’ WAS GROSSLY NEGLIGENT IN FAILING TO MAKE A PROPER OR SUFFICIENT SEARCH FOR THE BARGE, AND HER ONLY EXCUSE FOR ABANDONING THE BARGE, EVEN IF TRUE, RENDERED HER UNSEAWORTHY FOR HER VOYAGE AND HENCE EQUALLY LIABLE.

*The above is the main point in this case. It is our contention that the ‘Hardy’ made an absolutely insufficient search for the barge and abandoned her under most reprehensible circumstances. The lower court found that there was no negligence in this respect, but apparently wholly failed to consider in this connection the utter insufficiency of the excuse*



*offered for such abandonment, to wit: lack of enough fuel oil to permit of further delay.”* (Italics ours.)

Following this statement we proceeded to argue that the “Hardy’s” excuse that she did not have sufficient fuel oil to continue her voyage was untrue (Brief, pp. 21-25). This argument is now abandoned in view of the court’s decision. After said argument, however, we proceeded to the principal point in the case, basing our contention *solely* on the testimony of our opponents and citing numerous cases to support our views. The gist of this argument will be found on pages 25 to 30 inclusive of our brief, and further reference to it is made on the following eight pages. We do not deem it appropriate to again repeat what is already in the records of this court and, therefore, merely call attention to our opening statement in regard thereto on page 25 of our brief:

“We now propose to grasp the other horn of claimants’ dilemma *and to proceed on the assumption that the ‘Hardy’s’ testimony is true* and that she did not in fact have enough fuel oil to permit a further delay. If so, she was unseaworthy for her voyage and cannot escape responsibility *under her own testimony* (The Undaunted, 5 Asp. 580, cited *infra*).” (Italics ours.)

We believe, with all due respect to the court, that the above point (the main point in the case) was not given consideration. The point is in no way based on *disputed testimony*, but is based on *undisputed testimony*. It is a point in no way covered by the court’s decision.

We expressly pointed out in our brief (p. 21) that the lower court failed to consider this question, and thereby hoped to direct it specially to this court's attention. As the record now stands the appellants have not had their day in court as regards their main point for reversal.

Appellants submitted this case without oral argument because they felt that the briefs fully covered the situation and would receive careful attention. Nor do we doubt that they did receive such attention, but we do believe that, in preparing its decision, the court must have forgotten that the point in question had been raised, for we do not believe that the court would have passed it over if it had had it in mind. The court expressly deals with the alleged negligence of the "Hardy" in failing to relight the light on the barge, and in not keeping a proper lookout (which were comparatively minor points), but it ignores the vital contention made by us that a sufficient search was not made after the barge was lost. Admitting that the court's reasoning implies that it accepts the finding that there was not sufficient fuel oil left to continue the search, it does not imply that the lack of sufficient fuel oil did not make the "Hardy" unseaworthy.

Appellants realize, in ordinary cases, the futility of presenting petitions for a rehearing after cases have had careful consideration. They feel also, however, that where a case has not had full consideration, and a vital point has been overlooked, this court will recognize the injustice to them of letting the decision stand and promptly correct that injustice.



For the above reasons, and accepting the court's decision as far as it goes, appellants respectfully ask for a rehearing on the points presented by this petition and on those points alone.\*

Dated, San Francisco,  
February 10, 1916.

E. B. McCLANAHAN,  
S. H. DERBY,  
*Proctors for Appellants  
and Petitioners.*

---

CERTIFICATE OF COUNSEL.

We hereby certify that we are counsel for the appellants and petitioners in the above entitled cause, and that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

Dated, San Francisco,  
February 10, 1916.

E. B. McCLANAHAN,  
S. H. DERBY,  
*Of Counsel for Appellants  
and Petitioners.*

---

\*Affiliated with the point herein specifically presented is our claim that the lack of enough fuel oil to take the "Hardy" to San Francisco was not the proper criterion of her right to desert her tow while near **another** safe port, Fort Bragg (Brief, pp. 27, 30). This claim is also not passed on by the court and we simply wish to note it in passing, and ask a reconsideration of it also, if the petition be granted.

No. 2618.

---

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

---

K. V. KRUSE and R. BANKS, co-partners doing business under the firm name of "KRUSE & BANKS SHIPBUILDING COMPANY" (a corporation), on behalf of themselves and their underwriters,

Appellants,

vs.

M. J. SAVAGE, EDW. J. MORSER, JAMES H. HARDY, Inc., JAMES H. HARDY, HANS MICHAELSEN, MRS. F. RULFS and DR. ALEXANDER WARNER, claimants of the American steamer "Hardy," her tackle, apparel and furniture,

Appellees.

---

**Reply Brief for Appellees.**

---

W. S. ANDREWS,  
Proctor for Appellees.

---

Filed this.....day of November, 1915.

..... Clerk.

By..... Deputy Clerk.

THE JAMES H. BARRY CO.

Filed





IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

K. V. KRUSE and R. BANKS, co-  
partners doing business under the firm  
name of "KRUSE & BANKS SHIP-  
BUILDING COMPANY" (a corpor-  
ation), on behalf of themselves and  
their underwriters,

*Appellants,*

vs.

M. J. SAVAGE, EDW. J. MORSER,  
JAMES H. HARDY, Inc., JAMES  
H. HARDY, HANS MICHAEL-  
SEN, MRS. F. RULFS and DR.  
ALEXANDER WARNER, claimants  
of the American steamer "Hardy," her  
tackle, apparel and furniture,

*Appellees.*

No. 2618

---

REPLY BRIEF FOR APPELLEES.

---

STATEMENT OF FACTS.

At the solicitation of appellants, the steamer  
"Hardy" through her master, Hans Michaelsen, un-  
dertook for the sum of \$200 to tow a barge, owned



and built by them, from Coos Bay to San Francisco, with the understanding, according to appellees, but denied by appellants, that the towage was to be at appellants' own risk. The lower court found that the hawser for the tow was furnished by appellants. Captain Michaelsen carefully examined the hawser before sailing and found it to be a 10-inch rope more than 600 feet long and apparently without defect and easily capable of standing the strain to be placed on it. The appellants also furnished and equipped the barge with a lantern and oil to burn therein. Counsel state as an "undisputed fact" that the lantern was a "proper light," but in view of the fact that it went out within two hours after it was lit (and as counsel would contend, within the harbor), this statement is open to question.

The "Hardy" weighed anchor and started from Coos Bay on September 5, 1913, about 5 P. M., towing the barge which, as counsel say, was "stanch, strong and seaworthy and an especially easy barge to tow." Just as the "Hardy" was crossing the outer bar the light on the barge, furnished and lit by appellants, went out. While there was some evidence that this occurred at 6:15 P. M., the exact time was not firmly established, but the lower court was convinced that the *place* where the light went out was at the outer bar. The light was not again relit because in Captain Michaelsen's judgment, under the conditions existing, an attempt to do so in the ship's

boat would place the crew in great danger of drowning. The lower court declared that the evidence supports the master's judgment, and refused to review the Captain's action in this regard.

From the time the light went out on September 5, 1913, until 12:40 A. M. on September 7, 1913, the "Hardy" ran before a northwest wind, towing the barge, whose presence could always be distinguished by the foam that shot up from her prow. Between 12:20 A. M. and 12:40 A. M. on September 7, 1913, the hawser parted and the barge went adrift. The loss was discovered about 12:40 A. M. and in spite of her heavy deckload the "Hardy" was, by skilful seamanship, turned about and headed slowly north. All night long a look-out was kept for the barge. When daylight came, about 6 A. M. of September 7th, the "Hardy," being then north of where the barge had gone adrift, was headed south, and a vigorous search began. A low drifting fog greatly handicapped the search. The "Hardy" zig-zagged in and out, running slowly south, keeping a sharp lookout, but without catching sight of the barge, until 11:15 A. M. on September 7th, when Captain Michaelsen felt certain that he was south of the barge, as in fact he was. Then having only 60 barrels of fuel oil left and having still about 145 miles to go, the master determined that prudence demanded that he proceed to San Francisco. The "Hardy" arrived in San Francisco on September 8, 1913, having been 61



hours on the voyage. The barge drifted ashore near Caspar and was later salvaged by the steamer "Brunswick" and brought to San Francisco.

## ARGUMENT.

### THE QUESTION OF THE BURDEN OF PROOF.

Before analyzing and discussing the evidence in this case, it might be well to first consider the accuracy of the statement of counsel for the appellants that the burden of proof in this case rests upon appellees to show that they were not negligent in view of the admitted fact that the tow was damaged when she had no one on board. It is elementary that a tug is neither a common carrier nor an insurer and is only bound to use ordinary care. "Unlike the case of common carriers, no presumption of negligence arises on the part of a tug from the mere fact of an injury to her tow, and the burden rests upon the tow to prove that its loss or injury was due to negligence on the part of the tug in order to render the latter liable therefor" (38 *Cyc.*, 585). And the rule is not changed where the tow is damaged when no one is on board her. To contend that such is the case is to show a misapprehension of what constitutes the burden of proof. It has now been clearly demonstrated by such masters of the law of evidence as Thayer and Wigmore that the burden of proof in an action rests upon him who has the affirmative of

the issue and that this burden of proof never shifts. The plaintiff must sustain the allegations of his complaint or libel by the preponderance of the evidence. However, the "duty of going forward," as Professor Thayer called it, or the burden of the evidence, does shift from side to side. Where the plaintiff establishes a *prima facie* case either by the operation of a presumption or by some evidence, it devolves upon the defendant to produce sufficient evidence to combat the case presented. The duty of going forward shifts to him. Then the plaintiff must again produce evidence to meet that of the defendant, for the ultimate burden of proof is always on him and he must overcome the impression created by his opponent's testimony in order to secure a verdict.

Now it may well happen that certain facts when testified to or admitted will raise a *prima facie* case in favor of the plaintiff and relieve him of the burden of going forward, but not of the burden of proof. As stated in the article on *Towage*, 38 *Cyc.*, 585, "in some cases the undisputed circumstances of the disaster may constitute a *prima facie* case of negligence, and put the tug on the duty of explanation." The most that counsel for appellants could accurately claim from the fact that the tow was lost when she had no one representing appellants on board, would be that it established a *prima facie* presumption that the tug had been negligent and that the latter must give some explanation of the accident to avoid an ad-



verse judgment. This is all that "*The Seven Sons*," 29 Fed., 543, cited by appellants, holds. In that case a flat-boat was damaged when being towed on the Monongahela River. The *libelant proved that there was good boating stage of water during the trip and no apparent cause for the accident*. The respondents remained silent and attempted no explanation. There was no one representing the libelants on board the barge. It doesn't appear whether or not there was anyone on the barge representing respondent. Under these conditions the court held the circumstances of the disaster constituted a *prima facie* case of negligence and put on the tug the duty of explanation or of going forward. The burden of proof, however, never shifted from the libelant. As the court in that case said:

"As the case stands, there is no evidence to show the cause or manner of the accident, or what precautions were taken to avoid it, although these are matters peculiarly within the knowledge of the owners of the tow-boat and their employees. Under the proofs, then, what should be the judgment of the court?

"The owners of a tow-boat, it is true, are not common carriers, and they are responsible only for ordinary care, skill, and diligence. But a bailee subject to that degree of responsibility only, is yet bound to show how the goods intrusted to him were lost or damaged, before he can throw upon the bailor the burden of proof of negligence."

Nor do any of the cases cited in 38 *Cyc.*, 585, note

64, referred to by counsel, hold any more than that certain circumstances may put upon respondent the duty of explaining a presumed negligence arising from the fact itself. But such a situation would not relieve the appellants of the burden of proof; that is, the burden of proving that the barge was lost through the negligence of appellees. As said by the Court in

*The Bronx*, 86 Fed., 808:

“The burden of proof does not shift during the trial; but the introduction of evidence may give rise to a presumption of fact, and thus put upon a party the burden of explaining a situation from which, in the absence of explanation, his liability would be presumed.”

Further, the fact that the tow was lost at a time when she had no one on board does not alone constitute a prima facie case of negligence on the part of appellees, and the cases cited by counsel for appellants do not sustain such a position. Other and additional elements predicated negligence must exist. The mere fact that an unmanned barge is lost can raise no presumption of negligence, for the loss might be due to a great storm or some other unavoidable cause. Furthermore, the facts constituting the alleged negligence are disputed in this case. Appellees claim that appellants furnished the hawser and that the towage was undertaken at appellants' own risk; that the lamp was not relit because of danger to the sailors; that earnest endeavors were made to find the



barge and the search discontinued only on account of the safety of the tug. In view of this conflict in the evidence as to the facts constituting the alleged negligence, not even a *prima facie* case could rise against appellees. As the Court said in the case of

*Pederson vs. John D. Spreckels*, 87 Fed., 938:

“In cases where no questions are raised as to what caused the accident or the injury, and the circumstances are of such a character as to show that the thing which did happen could not have occurred unless there was negligence upon the part of the person having charge of it and control of such thing, then the presumption contended for would apply. But it would be a strange construction of the rule to apply it to a case like the one under consideration where all the facts as to the cause of the accident are in dispute and nothing occurred which of itself tended to show that the tug was at fault.”

And again as said by the Court in the case of

*Baltimore, etc. Barge Co. vs. Knickerbocker Steam Towage Co.*, 170 Fed., 442:

“When the tugs have accounted for the accident by showing a special emergency and have definitely described movements not improbable and not necessarily inconsistent with good seamanship, all presumption of negligence from the mere fact of the accident disappears, and the burden is cast upon libellant to establish negligence by a clear preponderance of proof.”

The burden of proof is therefore upon appellants

to demonstrate that the barge was lost through the negligence of appellees and this burden of proof never shifts.

With this preliminary as to where the burden of proof rests, let us now consider the points wherein appellants contend appellees were negligent. Counsel for appellants maintain that appellees were negligent in four particulars, any one of which was responsible for the damage to the barge. *First:* he contends that the hawser was defective and that appellees are responsible for any defect in the hawser. *Second:* Counsel contends that appellees were negligent in not re-lighting the light on the barge after it went out. *Third:* That appellees failed to discover the fact that the barge was adrift as soon as they should. *Fourth:* That appellees made an insufficient search for the barge and carelessly abandoned her. Let us discuss these contentions in the order named.

ARE THE APPELLEES RESPONSIBLE FOR THE BREAKING OF THE HAWSER AND THE CONSEQUENT LOSS OF THE BARGE?

In the first place it must be remembered that the steamer "Hardy" was not engaged in the towing business; it was and is a lumber schooner plying between Coos Bay and San Francisco. It was not equipped with the appliances that are to be found on a tug regularly engaged in the business of towing. It did not have a towing drum nor was it equipped with



hawsers such as tugs carry. The appellants had to get their barge towed to San Francisco, and naturally desired to have that done as cheaply as possible, especially in view of the fact that they were selling the barge at a price much below the trade price in San Francisco in order to get the business (pp. 68, 72). The steamer "Hardy" was making regular trips between Coos Bay and San Francisco, and therefore offered a cheap means of getting the barge towed south. Appellants were aware that the steamer "Hardy" was not engaged in the towing business, and in soliciting her to tow their barge they were accepting whatever equipment she might have. The steamer "Hardy" did not possess a hawser and we think the testimony leaves little room for doubt but that the lower court was right in finding that the hawser was furnished by appellants. Though Mr. Banks denies that he ever applied for the hawser to the Simpson Lumber Co. for the steamer "Hardy," yet he admits that he told Captain Michaelsen that "he could secure a line from the Simpson Lumber Co.,—that they had tow-lines there" (p. 75). On this subject Captain Michaelsen testifies as follows:

"Q. Before you took the tow, what if any conversation did you have with Mr. Banks upon the subject? A. Mr. Banks was to furnish everything, tow-lines and lights and everything.

"Q. Just give the conversation, so far as you can remember it, that led up to that conclusion or agreement that you speak of; how did he approach you, what did he do and say? A. Well, the first

we spoke of it was about three trips before; we made three trips I think while he was building the barge. He asked me how much I would charge him for towing down the two barges, and at that time I told him that I did not know for sure how much I would charge, and I said I would let him know later. I saw Mr. Banks up there every trip I was up there, and the following trip I told Mr. Banks that if he would furnish everything I would tow them down for \$500.00. Mr. Banks told me that was too much, he thought that was too much. Well, I told him, 'I don't care, because I am going to no trouble to get a tow-line.' So he said he could get a tow-line from Mr. Simpson—Mr. Banks did. We verbally agreed that I would tow the two barges, either take two or the one, and I said to Mr. Banks, 'We will charge \$500.00, you can count \$300 for the first one and \$200 for the small one, or else \$250 apiece to tow them down,' and he was to furnish the tow-line, to get the tow-line from Simpson and furnish the lights and everything" (pp. 105, 106).

Just before starting to tow the barge, Captain Michaelsen met Edgar Simpson, who lent the hawser, and said to him: "Are there going to be any charges against me on that tow-line for Kruse and Banks?" Mr. Simpson replied, "No, if there is anything to be charged it will be up against the shipyard of Kruse and Banks" (pp. 107, 118).

The fact that Kruse & Banks were furnishing the line and not the steamer "Hardy" is strongly supported by the testimony of L. F. Falkenstein, an employee of Edgar Simpson and a disinterested witness.

Mr. Falkenstein testifies that he had often talked over the telephone with Mr. Banks, and knew his voice, and that shortly before the steamer "Hardy" left Coos Bay with the barge in tow he had a conversation with Mr. Banks over the telephone relative to securing a hawser from the Simpson Lumber Co. for the Steamer "Hardy." In his deposition Mr. Falkenstein said:

"I was in the office of the Simpson Lumber Co. when I answered the telephone. He (Mr. Banks) asked if the 'Hardy' could have a tow-line to tow the barge to San Francisco and I told him that the tow-line was in the office, but he would have to see Mr. Edgar Simpson about the loan of it. That is, the tow-line was in the building not in the office" (p. 43).

On cross-examination Mr. Falkenstein was asked:

"Q. Have you any way of fixing the conversation that you had with Mr. Banks, relative to the tow-line, as to which barge he was talking in regard to? A. No, I have not.

"Q. You don't know whether it was the barge the 'Hardy' towed or the other barge. A. This barge that this conversation was in regard to, was the barge that the 'Hardy' towed, because he asked for *the tow-line for the 'Hardy'*" (p. 45).

Again Mr. Falkenstein was asked:

"Q. Do you know that the tow-line was taken within two days after that conversation?

"A. About that time.

"Q. And was that the trip of the 'Hardy' in



which she lost a barge belonging to Kruse and Banks?

A. Well, I do not know that she lost two, but the time I saw her going out I know that she lost that barge, from hearing of it afterwards.

"Q. And when was the telephone communication which you had with Mr. Banks with reference to the time that you saw her go out?

"A. A few days before that.

"Q. How long before?

"A. It wasn't over two days, I don't believe" (p. 46).

The deposition of Edgar Simpson was taken, and he was asked:

"Q. What do you know about the tow-line which was used by the steamer 'Hardy' in towing that barge?

"A. I know that the line belonged to the Simpson Lumber Co.

"Q. How was it obtained from the Simpson Lumber Co., and who obtained it?

"A. The ship yard telephoned to our office and asked permission for the use of the line. Mr. Falkenstein answered and told them it was all right if I was willing. He afterwards mentioned it to me and I said it was all right.

"Q. Did you have any conversation with the master of the steamship 'Hardy' before he sailed on that trip with reference to the tow-line?

"A. Yes.

"Q. What was that conversation?

"A. I met him somewhere and he asked me if I was going to charge him for the use of the line. I told him no, that the ship yard would have to pay.

"Q. To whom did you understand that the Simpson Lumber Co. was loaning the line?

"A. Kruse and Banks Ship Yard" (pp. 47, 48, 49).

"Q. If it had been a subsequent barge that had been towed by some other vessel, then you would not have told the master of the steamship 'Hardy' that you wanted to charge this particular tow-line to Kruse and Banks?

"A. No, certainly not.

"Q. You had known by reason of your conversation with the master of the steamship 'Hardy' that the tow-line in question had to do with the towing of this particular barge by the steamship 'Hardy'?

"A. That is my impression that this is the barge it was for" (pp. 48, 49).

The testimony of Captain Michaelsen, L. F. Falkenstein and Mr. Edgar Simpson is all to the effect that the hawser was borrowed from the Simpson Lumber Co. by Kruse & Banks. Mr. Banks alone contradicted this testimony. In view of the fact that both Mr. Falkenstein and Mr. Simpson are disinterested witnesses and that a perusal of the testimony of Mr. Banks will show that his recollection was not very certain, and further, that the burden of proof is upon appellants to establish that appellees furnished the hawser, we believe we can correctly state that the weight of evidence shows that the hawser was furnished by appellants.

Counsel maintain that the evidence shows that appellees furnished the hawser, and then realizing the weakness of this contention, stated that in any event the matter is of no importance for the tug

is responsible for the quality of the towing lines. Whether immaterial or not, the evidence amply justifies the finding of the lower court that appellants themselves furnished the hawser, and appellees are thereby relieved from any responsibility that could be said to arise from having furnished the towing line. "*Re Moran*," 120 Fed., 556, cited by counsel to support the proposition that the tug is responsible when the tow furnishes the line, is not in point, for in that case the tug had sufficient hawsers of its own and preferred to use the tow's line. On the other hand, it was held in "*The Echo*," 8 Fed. Cas. No. 4263, that a tug was not responsible for a defective hawser furnished by a tow. In that case

"A brig was towed out from a pier by a tug by means of a hawser furnished by the brig. The tug controlled the brig, whose master and crew took no part in the work except as directed by the master of the tug. The hawser parted and the brig went foul of another vessel and received damages, to recover which she filed a libel against the tug."

Judge Blatchford said:

"Assuming it to be true, as alleged in the libel, that, at the time of the injury to the brig, the brig was under the sole control of the master and crew of the tug, and that the master and crew of the brig took no part in the work of moving her, except as they were directed by the master of the tug, I am not satisfied that the libelants have made out the charge of libel; that in moving the brig, those navigating the tug conducted the business so carelessly, negligently, and improperly, that the brig



received the injury which happened to her. The weight of the evidence is, that it was the parting of the hawser between the brig and the tug which caused the rigging of the brig to foul with the yard of the bark. For the condition and strength of the hawser the tug was not, as between herself and the brig, responsible in the event of injury to the brig from the weakness of the hawser. The brig must bear herself all loss occurring to herself from the parting of such hawser, as it is not shown to have parted through any negligence on the part of the tug."

However, let us assume that it is immaterial who furnished the line and that the general law is, as stated by counsel, "that it is the duty of the towing steamer, and not the tow, to see that the towing lines are sufficient in length and quality." It is also well established that the tug is not a common carrier or insurer and is only bound to exercise reasonable skill, care and diligence (38 *Cyc.*, 563). The tug can only be required to use ordinary care in equipping herself with towing appliances and cannot be held liable for some hidden defect in the hawser which could not be found by the use of ordinary care and diligence (*Re "Moran,"* 120 Fed., 556). As a matter of fact, defects often exist in hawsers which even experts cannot detect. Counsel themselves admit that they do not "make the contention on this appeal that the 'Hardy' was negligent in the use of the hawser in question, for it was apparently a sufficient one" (App. Brief, p. 10). The evidence in this case shows *without contradiction* that Captain Michaelsen exam-

ined the hawser from end to end before using it, and he testified that after so examining it he was "satisfied it was perfectly good rope for that tow" (p. 119). The hawser was a 10-inch line and was over 600 feet long (p. 129). Such a hawser should ordinarily be strong enough to tow a barge three times the size of the one involved in this action. Indeed, as one of the appellants himself testified, the barge was exceptionally easy to tow on account of her ends being very much sloped (pp. 66, 68).

In view of these circumstances and the examination of the hawser made by Captain Michaelsen, it is difficult to see in what particular Captain Michaelsen failed to observe ordinary care in using Simpson Co.'s line, even though it be assumed that appellees were furnishing the hawser. And it seems to us that much less can appellees be held responsible for any hidden defect in the hawser when, as the evidence clearly shows, the hawser was procured and furnished to the "Hardy" by appellants.

There being no negligence chargeable to the "Hardy" in using the tow's hawser, and counsel so admits (App. Brief, p. 10), appellees can only be held responsible on the theory that the tug warranted the strength of the line and that if it broke, appellees would be liable for any damage resulting therefrom. Such a theory is obviously untenable. A tug is only required to use ordinary care in equipping herself with towing appliances. A tug is not liable as a

common carrier or an insurer (38 Cyc., 562), and it is therefore difficult to see how she can be held to be an insurer of her equipment. As the Court said in that case so strongly relied upon by appellants, and entitled:

*"The Moran,"* 120 Fed., 566:

"Neither the tug nor her owner are liable on account of the hawser, or the use made thereof. It is urged that the owner guarantees the equipment of the tug; that is, that he engages absolutely that each line, rope, etc., when properly used, shall bear without breaking the strain made necessary by its office, caused by the ordinary violence of wind and weather, and that he will be liable for any damages happening under such conditions approximately from an unworthy sea line. *It would be interesting to discover by what analogy or reasoning a tower not held to be a common carrier (The Syracuse, 79 U. S., 167, 20 L. ed., 382; The Margaret, 94 U. S., 494, 497, 24 L. ed., 146; The J. P. Donoldson, 167 U. S., 603, 17 Sup. Ct., 951, 42 L. ed., 292) is regarded as an insurer of his tug's equipment."*

Counsel seem very much vexed because the lower court stated that the parting of the hawser "was the real cause of the loss of the barge." Counsel construes this statement as a finding that the parting of the hawser was the proximate cause of the loss of the barge. Assuming this construction to be correct, we can see no fault in the finding. Many definitions of "proximate cause" have been given. It has been defined as "an act which directly produced or con-



curred directly in producing the injury" (32 *Cyc.*, 745). To us it would seem that the breaking of the hawser was the act which directly caused the loss. But were it otherwise, counsel's objection seems of little importance in view of the fact that the Court expressly found that appellees were not negligent, either before or after the breaking of the hawser, in any of the particulars charged.

At this juncture, while not a matter of importance in view of the foregoing, it might also be pointed out that Captain Michaelsen testified, though contradicted by Mr. Banks, that it was agreed in the verbal contract of towage that appellants were to furnish the "tow-lines, lights, and everything," and that appellees were to "take no risks" (pp. 106, 107). In spite of the aspersions cast by appellants' counsel on the veracity of Captain Michaelsen for his testimony in this particular, we believe the circumstances support the truth of his testimony. Appellants did furnish the light, oil and bridle (p. 78), and the lower court believed the testimony of Captain Michaelsen that appellants furnished the hawser, the testimony of Mr. Banks to the contrary notwithstanding. It would seem natural that Captain Michaelsen should stipulate against the assumption of any risk in undertaking the tow, in view of the fact that he was not in the towing business, that the vessel was not equipped for such work, and that he was undertaking the tow at a low figure.

In a word, then, no blame or liability can be placed on appellees for the breaking of the hawser and the consequent loss of the barge, because:

*First:* The evidence shows that the hawser was furnished to "The Hardy" by the appellants.

*Second:* Because the appellees, whether they did or did not furnish the hawser, at any rate did not warrant its soundness and cannot be held liable as a common carrier or an insurer. Even though Captain Michaelsen's stipulation that appellees were not to assume any risks was ineffective, as stated by counsel, still appellees were required merely to exercise ordinary care, and the evidence amply shows, without counsel's admission, that Captain Michaelsen was in no degree negligent in using the Simpson hawser. Not being an insurer or common carrier, and having fulfilled the duty laid upon her of exercising ordinary care, the lower court was clearly right in finding "that the 'Hardy' was not responsible for the parting of such hawser."

SHOULD APPELLEES BE HELD LIABLE FOR DAMAGES BECAUSE THE LAMP OF THE BARGE WAS NOT RELIT?

This question involves two considerations: first, was the failure to relight the light on the barge a proximate cause of the loss of the barge; second, did appellees fail to use ordinary care in not relighting the lamp?

Counsel for appellants contend that the failure of Captain Michaelsen to relight the lamp on the barge after it went out at the bar was gross negligence and was a direct and proximate cause of the loss of the barge. They apparently consider this omission as more favorable to them than the use of the hawser by appellees, for they characterize this omission as appellees' "first main fault," and pass over the question as to negligence in the use of the hawser with the remark that "it really has little bearing on the case." To us it seems that the failure of Captain Michaelsen to relight the lamp is a matter of little importance in this case. Counsel assume that if the lamp had been relit on September 5th or on September 6th, that it would have been burning when the hawser broke and would have continued burning until daylight on September 7th, and so the tug would have been able to find the barge. We realize that it is idle to enter into the field of conjecture, but it does seem to us that it does not at all follow that the lamp would have been burning when the hawser broke and thereafter, even if it had been relit on September 5th or September 6th. It might well have gone out simultaneously with the breaking of the line, or during the night of September 6th when it could not be relit. Indeed, the fact that it went out when crossing the bar would seem to indicate that it might do such a thing again. While it is true that if the lamp had continued to burn after the hawser broke Captain



Michaelsen might have been able to locate the barge, it doesn't at all follow that the lamp would have been burning when the rope broke if it had been relit after it first went out. In other words, while it *may be* that the failure to relight the lamp on September 5th or September 6th prevented Captain Michaelsen from finding the barge, it isn't *necessarily* true that such omission was a proximate cause of the loss, for the lamp might have gone out at any time during the night of September 7th and the same result would have happened.

But assuming that the lamp, if it had been relit on September 5th, would have continued burning through the night of September 7th, and that this light would have enabled Captain Michaelsen to locate the barge, we fail to see wherein Captain Michaelsen was in any way careless or negligent in not relighting the lamp. The light went out as the steamer "Hardy" was crossing the outer edge of the bar (p. 107). The attempt of appellants to show by evidence of the time taken by the "Hardy" to reach the bar, that the light went out when the barge was in the harbor, was very far fetched and requires little or no reply. The place where the light went out would naturally be more certainly and accurately fixed in the minds of the officers of the steamer "Hardy" than the minute when it occurred. A number of witnesses testified that the light went out as the tug was crossing the bar, and this testimony is

uncontradicted (Capt. Michaelsen, p. 107; A. Hultgreen, p. 143; Rudolph Sanne, p. 161).

It would have been very imprudent and probably impossible for Captain Michaelsen to have attempted to relight the lamp at the time when it went out. As Captain Michaelsen answered in reply to a question as to why he did not then lower a boat and relight the lamp:

"The wind was too swift and the sea was too strong and night-time was setting in, it was getting dark. By the time I got clear off-shore in safety with my vessel, it was dark, and it was not fit to lower a boat to board that barge, it was not fit to board the barge in safety.

"Q. Generally, whether it was dark or daylight, what would be the danger of attempting to board that barge with the sea running?

"A. Well, there would be the danger of drowning some of the boatmen.

"Q. Explain in detail, if you can, how the barge acts on the sea, with a small boat coming alongside of her?

"A. It is a flush-bottom barge, and with a strong northwest sea running, it will come up on top of one sea and it will roll right over and set right down; if you are down in the sea, she is liable to roll half way over you and list over you; she was flush, and if she hits you you go out, there is nothing to hold fast to. There is no chance at all. She would smash a little boat up and drown the men. They would be in danger. In my judgment, I would not put any man out to face that barge in that way, and I didn't think I should try to drown any of the men to get a light on the barge.

"Q. Was there anybody on the barge to receive a line, or anything of that sort?

"A. No sir, nobody was on the barge" (p. 109).

Again on cross-examination Captain Michaelsen testified:

"Q. But you didn't let down a boat to relight the light on the barge?

"A. No; I judged the sea a little heavy and the wind a little too strong to lay around at night time and try to put men out in the night time and try to get around that barge. That was the way it appeared to me that night as far as I could see. The way the wind and the sea appeared to me, it was not proper at all to try to get any men to go in a small boat and try to board the barge in the middle of the night in the dark, because it was a dark night.

"Q. You had a good working boat, did you not?

"A. Yes, I had a good working boat.

"Q. Could you have gone under the lee of the barge in perfect safety?

"A. The lee of the barge is just as bad as the weather side of the barge. There is no keel on this barge. It is not like a vessel. I feel satisfied I could lower a boat on my own vessel and come around to a deep sea vessel, that is, if there were men around who could assist us with a line. But that night when we had to go alongside the barge and get ahold of it with your hands, and if you got hold like that you would slip off and if you did that and came up on one of the seas and if you happened to come up on the sea, you would knock over the boat; it does not take much to break over a little row-boat or capsize it.

"Q. Your men could all swim could they not?



"A. I never examined them as to that. I am not going to try and risk the men to be swamped out of the boat, because then I am up against the government myself. I am not supposed to go that far. I am supposed to use a sound judgment in those cases. And when it goes that far that those men have to go out and swim, then I am risking their lives, and I am taking chances either that they will drown or make it. They are human beings, you know" (pp. 124, 125).

A. Hultgreen, the first officer of the steamer "Hardy" and an officer with 21 years' sea experience, said:

"In my opinion it was pretty near impossible to board that barge at any stage from the time we went over that bar until we lost her, and it would have been a needless risk of life and a needless risk of getting a boat swamped to get anywhere near her the way the barge was working in the sea; she would lift up and show half her bottom above the water, and she would jump down again and she would go from one sea to the other, and as the sea increased, she would jump from sea to sea; every sea she would make a jump" (p. 143).

The testimony and argument which counsel for appellants advance to meet the foregoing testimony is inaccurate, specious and flimsy. Counsel seize every opportunity to cast reflections on the veracity of appellees' witnesses, and even go so far as to intimate that claimants have fraudulently tampered with their books and endeavored to frame up their case. We most indignantly deny the charge. The Pilot House Log Book put in evidence is nothing more than a

scratch book (p. 131). Captain Michaelsen frankly admitted making erasures in this book, and a cursory examination of it by the Court will show many other erasures and changes scattered throughout. Appellants rely on such testimony as that of Banks that when the barge left the weather was good; that of J. Dunson, lighthouse keeper at Coos Bay, that the weather was not bad on September 5th; that of Captain Britt that conditions at the bar were moderate and that a boat could have been launched and the light relit without risk; that of Messrs. Rosenthal and Davenport that Captain Michaelsen did not tell them the weather prevented him from relighting the lamp!

Now claimants have never claimed that a storm was raging as the steamer "Hardy" crossed the bar; they do say that a boat could not be lowered at the *bar* without great danger of being swamped and that soon thereafter it became dark and the wind and sea increased. The testimony of Banks that the weather was good and of J. Dunson that "it wasn't bad" are not at all contradictory to the testimony of claimants' witnesses. While appellants' witness, Captain Britt, said that "*as far as he knew*" a boat could have been lowered from the steamer "Hardy" at sea off Coos Bay; he also said: "A boat could have been launched in the lower bay, but *probably not on the bar*—can't call that the lower bay" (p. 27). Furthermore, Captain Britt testified that a fishing boat was swamped on September 5th at about 7 P. M. (45 minutes after

the light went out on the barge) while it was trying to cross this bar (p. 30). The testimony of Messrs. Rosenthal and Davenport that Captain Michaelsen did not tell them that the wind and sea prevented him from lowering a boat is obviously of little weight even if true. It may be very true that Captain Michaelsen thought that the barge was safe enough considering its small size, its easy riding qualities and the size of the hawser. Captain Michaelsen, however, testifies that he did tell Messrs. Rosenthal and Davenport that the weather did not permit the lowering of a boat safely, and he is corroborated by the engineer who overheard the conversation (pp. 155, 157). There has certainly been no evidence adduced by appellants on this phase of the case of very much weight.

Nor could Captain Michaelsen return into the harbor in order to relight the lamp.

"A. The light went out when we were crossing the bar, on the outer edge of the bar.

"Q. On the outer edge of the bar?

"A. Yes.

"When you arrived at that point, could you have turned around and gone back into the inner bay?

"A. No, sir.

"Q. Why not?

"A. We would lose the ship.

"Q. Detail the reasons why?

"A. The tide was just commencing to ebb already and there was just enough water for me to get out on top high water; against an ebb tide I could not get in with that ship, I would hammer the bottom out of it. I could feel the bottom



of the bar as I went out, once I felt the bottom" (Michaelsen, pp. 107, 108).

During the *next day* (*Sept. 6th*) conditions were, if anything, worse, as shown by the following testimony:

"Q. What were the conditions the following day: Did you go through the next day?

"A. Yes, we went all day. The wind was increasing as we came along, and the sea was increasing; there was a strong northwest wind and sea.

"Q. You heard what Mr. Rosenthal and Mr. Davenport had to say about what you said to them concerning the light?

"A. Yes, I heard what they said.

"Q. What, if anything, have you to say about that testimony and that conversation?

"A. I told Mr. Davenport that the weather did not permit me to relight the light, that was why I did not have it lit. Mr. Davenport knows very well I told him so. The mate and the chief engineer stood on the poop when I told Mr. Rosenthal the same thing, that the weather did not permit us to relight the light. If I had any chance to relight her, I would certainly have relit her in safety to myself, but I did not want to drown anybody to relight the light; I would not permit anybody to do that" (pp. 109, 110).

"Q. You considered that it was too rough during the whole of that day to put down your working boat?

"A. Yes, sir" (p. 127).

"Q. You say the wind and sea increased; what do you mean, from what time to what time?

(A. Hultgreen) "A. After we crossed the bar, we had a westerly swell coming in toward the bar, and as soon as we got clear of the bell buoy and shaped our course toward the southard, we caught the wind, a strong northwest wind.

"Q. And it kept on increasing during the night?

"A. Yes, sir.

"Q. How about the following day?

"A. Well, it was strong the whole day. It was strong all the way down, and in the afternoon before we lost the barge it increased a good deal, as it most always does near Cape Mendocino and Point Gorda; with northwest weather there is almost always a stronger breeze blowing a few miles to the northward and a few miles to the southward of those points" (Hultgreen, pp. 143, 144).

"Q. What have you to say concerning the condition of the sea and the behavior of the barge during the day preceding her loss?

(K. Knudson). "A. Well, it was pretty rough; that is all I have to say. There was a pretty strong wind and a high sea going. That is the only thing I can say about the weather and the wind" (Knudson, pp. 156, 157).

"Q. What was the condition of the sea from that time on up to the time the barge was lost?

(Rudolph Sanne) "A. The next day it was still rough, blowing pretty good in the morning. We had a watch on deck in the morning, from 8 to 12—we had a watch below, and in fact I had a watch on deck again, and I was working aft, and I was looking at the barge, and she was more than tossing around there, and it was impossible to get a boat alongside the barge at that time.

"Q. You were down below from what time do you say?

"A. From 8 to 12 in the morning.

"Q. So you don't know anything about the conditions at that time?

"A. No, but it was blowing in the morning, and it was blowing when I came on deck again at 12 o'clock, so it must have been blowing all the time" (Sanne, p. 162).

The foregoing uncontradicted testimony should be convincing. But it might further be pointed out that the barge was 86 feet long by 36 feet wide by 8 feet deep (p. 81). She was flat like a table, except that her hatches rose 14 inches from the deck, but these hatches were 10 feet from either side of the barge. She had about 6 feet free-board and had nothing on her to grasp (pp. 78, 79). She was light and tossed hither and thither on the waves (p. 109). The danger of attempting to board such a scow in a heavy sea and wind must be apparent.

The testimony which counsel for appellants summarize on pages 16 and 17 of their brief to meet the foregoing evidence is pitifully weak and inadequate. The fact that the steamer "Hardy" made 179 miles on September 6th was to be expected in view of the fact that she was running before the wind, and that there was a following sea. The fact that the barge was not water-logged when Captain Brennan of the "Watson" saw her is of no consequence. The barge was flush decked and her hatches were battened down (p. 79). She rode light and it was almost impossible for water to get into her. It wasn't until



after the barge had run ashore and been damaged that she became water-logged. The fact that the "Brunswick," when bringing her down from the place where she had run aground, succeeded in picking her up when the hawser broke the second time is beside the mark, for, as the lower court ruled, in order to go into that matter it would be necessary to investigate all the conditions existing when the "Brunswick" was towing the barge. Besides, the barge was water-logged when the "Brunswick" was towing her and it is obvious that it was infinitely easier to get alongside of her in that condition than when the "Hardy" was towing her. When the barge was water-logged she could not jump and toss about; the water would run to one end and hold her. As Captain Brennan on behalf of appellants testified:

"If she had water in her, one end of her would go down; when she lifts the water will go to one end, and she is loggy and slow" (p. 57).

Again the statement of Captain Brennan that he could have boarded the barge when he saw her is not at all prejudicial, for the Captain also testified:

"At the time I passed her, the waves were not big at all; she was just riding along nice and smooth. *There had been (a heavy sea) all night*, but I told you at that time the sea was some better; it was in better shape then. There was not much wind at the time. *The wind had been blowing up until midnight around Point Arena*, but it died down that morning, and it freshened up a little bit again after we came up the coast" (p 57).

Finally the testimony of Captain Self that he found the weather comparatively calm on his voyage south from Coos Bay to San Francisco is obviously irrelevant, for he left Coos Bay 16 hours after the "Hardy," and it is well known that a few miles at sea may bring entirely different conditions. As appellants' witness, Captain Britt, said:

"Q. Mr. Britt, do you think that your observations at Coos Bay would throw much light on the condition of the sea at Point Gorda, on the California coast?

"A. No, I do not. The weather conditions may be entirely different there at the same time" (p. 28).

We submit that the evidence in this case shows that Captain Michaelsen was not negligent in the slightest degree in not relighting the lamp, either at the bar or during the following day. The size of the hawser and the smallness and riding qualities of the barge justified him in assuming that there was no danger of the barge breaking loose. The fact that the barge was flush-decked with a 6-foot freeboard and no projection to grasp; the fact that the tow rode light on the seas and tossed about; the danger at the bar, and the following wind and waves at sea, all made it dangerous and inadvisable to risk the men's lives in a small boat; especially when there did not seem any urgent need for taking such risks. In addition to the usual watch a man was kept stationed at the stern to watch the barge (pp. 110, 111), and even

in the darkness her presence could be ascertained by the foam (pp. 111, 128, 145, 160). A light known as an anchor or riding light was put in the rigging to warn other vessels not to come too near. Orders were left to blow the danger whistle if any craft approached (p. 110). In fact, it seems to us that everything was done in this matter by Captain Michaelson that prudence and good seamanship would dictate. We do not believe that the failure to relight the lamp was a proximate cause of the loss of the barge; but if it was, we submit that no charge of negligence against Captain Michaelson for not relighting the lamp can be sustained.

DID APPELLEES FAIL TO DISCOVER THAT THE BARGE WAS  
ADrift AS SOON AS SHE SHOULD?

Counsel for appellants contend that the "Hardy" failed to discover the fact that the barge was adrift as soon as she should and thereby lost her best chances of locating and finding the tow. This contention is so little supported by the testimony as to hardly merit a reply. However, we will for the convenience of the Court gather together here some of the testimony on this phase of the case.

CAPTAIN HANS MICHAELSON.

"Q. Now, Captain, on the way down, what if any watch did you have set on the barge?

"A. As usual; we had the usual men, besides an extra man on the poop looking out for the tow,



especially as we had no light. I left orders to the men on the bridge to blow a danger whistle if anything approached us from the stern, and in addition I hung up an anchor light, or what we call a riding light, on the main boom aloft to attract attention to keep away. That is the next best thing we could do under the circumstances, because I could not get a chance to get to the barge.

“Q. This poop deck you speak of, where you had a watch on the barge, that is on the stern of the vessel, is it not?

“A. Yes, sir.

“Q. And besides that you had your regular watch on the ship?

“A. Yes, sir.

“Q. Was there a watch on that poop at the time that you lost her?

“A. Yes.

“Q. I presume you were not on deck at that time, were you?

“A. I went below at ten o'clock. I went to bed at ten o'clock at night, and left my order as usual, to keep a good look-out for the tow and the ship and the steering, and to let me know if anything occurred.

“Q. The first you knew of it was when a report was brought to you?

“A. The first report I got was at twelve o'clock; the second officer reported at twelve o'clock that everything was fine, that the sea and wind were about the same, and that the tow was there, and everything was O. K. At 12:40 the first mate came and called me and said that we had lost the tow. It was a very dark and cloudy night. He was looking for a few minutes, between him and the man that was aft looking out; he said he was looking for a couple of minutes, he felt sure that there was no barge behind us, because he could not see the foam, and he came right and

called me, and he said he felt satisfied we lost the tow" (pp. 110, 111).

1ST OFFICER A. HULTGREEN.

"Q. Were you on watch at the time the barge was lost?

"A. Yes, sir.

"Q. How many men were on watch, or who was on watch; what watch was there?

"A. There was the regular watch, a man at the wheel and a man at the look-out, and one man specially looking out for the barge.

"Q. Where was he stationed?

"A. He was stationed aft.

"Q. Where?

"A. On the poop.

"Q. Does her poop run up to the stern?

"A. The poop is right aft the after deck. My position up on the bridge is above it, on top of the house, where I have a view right astern and all around.

"Q. I understand that, but what I want to get at is, her poop is aft, and it runs up flush with the stern of the vessel, does it?

"A. Yes, sir, there is just a rail around the stern.

"Q. The line of the tow came up over the poop, did it not?

"A. Yes, sir, and made fast to the bitt.

"Q. And on that poop is where the man was watching the tow?

"A. Yes, sir.

"Q. And your position was on the bridge?

"A. Yes, sir.

"Q. And you could see the tow from the bridge also?

"A. I had a clear view, I could see the tow from the bridge.

“Q. What could you see of the tow during the night, to ascertain whether she was there or not?

“A. When I came up at twelve o’clock it was a very dark and cloudy night, but otherwise seemed to be pretty clear, but it was very dark, but *you could plainly see the milk-white foam, and the forepart of the barge was riding over the sea; you could also see by the hawser.* I relieved the second officer and made myself sure that the barge was there.

“Q. Previously to the loss of the barge, what, if anything, did you do about going down and examining the tow-line?

“A. About twenty minutes past twelve I went down and had a look at the chock where the line went through to see that the chafing gear was all right, and at that time I plainly saw the barge astern. I went up on the bridge again, and I was walking up and down there looking ahead, and once in a while—once every minute or so—looking astern, taking a view all around, as we have to do, having charge of a ship on the watch; and at about twenty-five minutes to one, as near as I can recollect it was, I looked and I did not see the foam, I could not see the foam there; I thought perhaps it had run to the side, and the foam was ahead for a little while; sometimes it would take a sheer on the sea and you could not see the foam so plain. So I was looking very sharp for the barge for a minute or so, and I sung out to the man who was stationed there to look out for the barge, ‘Can you see the light—I mean, can you see the barge?’ He said, ‘No.’ I took the glasses and I looked through the glasses and I didn’t see no sign of her, and so I called the master right then and there. As soon as the master was called, I called the watch on the deck, and they came aft and we started to heave in the hawser, and we took the hawser through the capstan. Meanwhile



the captain was up and the ship was stopped. As soon as the hawser was in, I went up to the bridge to the captain and reported the hawser in, and he ordered the helm hard aport and we hove her to" (pp. 144, 145, 146).

HENRY PREEGEN (sailor).

"Q. You were one of the crew of the 'Hardy,' were you?

"A. I was at that time, just on that trip.

"Q. Where were you stationed?

"A. I was aft on the poop-deck there.

"Q. What were you doing?

"A. Just stationed there specially to watch out for the barge.

"Q. How long had you been there?

"A. From 6 to 12.

"Q. From 6 to 12?

"A. That night, yes.

"Q. And at twelve o'clock were you relieved?

"A. I was relieved at twelve o'clock.

"Q. Who relieved you?

"A. Well, Joe—I don't know his last name; he was a sailor; I don't know his last name.

"Q. He is not on the 'Hardy' now?

"A. No, I don't think he is.

"Q. During the time you were watching the barge, how did you tell she was there?

"A. By the foam and then every once in a while you could get a glimpse of it. You can kind of see the form of it riding up and down, you could see the form of the vessel and the way she was riding she would naturally throw some foam" (pp. 159, 160).

"THE COURT—Q. You did not see whether or not the barge was there when you went off watch?

"A. It was there, yes sir" (p. 161).

In the face of the foregoing testimony how absurd and futile is the attempt of counsel for appellants to make it appear that the barge must have been lost for hours before the fact became known to the officers of the "Hardy" because Mr. Davenport testified that the hawser to him had the appearance of having been towed in the water a very long time. Equally weak is the attempt of counsel to support their contention in the matter by saying that claimants did not put on the stand as witnesses in their behalf the sailor who was on watch at the stern when the barge broke loose, and also the engineer who was on duty at the time. The sailor who was on watch at the time the hawser parted was not with the "Hardy" when the trial took place (p. 160), and the engineer in question was busy on board ship during the trial and could not leave because under the law the "Hardy" would then have to stop discharging (p. 159). If counsel for appellants considered that the testimony of these men would be favorable to themselves, why did they not subpoena them on their own behalf, or take their depositions? No demand was made at the trial that these men be called as witnesses. To argue that they would have testified in favor of appellants because appellees did not consider their case in this regard required any further *cumulative* evidence, shows how utterly weak and without foundation is this third charge of negligence on the part of appellants.

## DID APPELLEES NEGLIGENTLY ABANDON THE BARGE?

The final contention made by appellants is that the "Hardy" did not search sufficiently for the barge and "abandoned her under the most reprehensible circumstances." Let us see if there is any justification for this charge.

The barge broke adrift at about 12:40 A. M. on September 7th, 1913, and as soon as the hawser was drawn in, which took about twenty minutes (p. 140), the "Hardy," about 1 A. M., was hove to—that is, she turned about and headed northward (p. 140). This was a very dangerous operation. The steamer "Hardy" was carrying a very heavy deck load of lumber. There was a heavy northwest wind and sea. At the moment that the "Hardy" was turned sideways to this wind and sea there was very grave danger that she would lose her housing and deck-load, and might even be capsized. Captain Michaelsen took this chance and through good seamanship succeeded. She proceeded northwest by north against a strong wind and heavy sea at half speed until daylight, that is, until about 6 A. M. (pp. 133, 134). It was necessary to run the ship northward, for this was the only way of holding the ship. She could not lie sideways to wind and sea, for then she would be, as just pointed out, in constant danger of losing her housing and cargo, and even of capsizing. Hence she had to proceed either northward or southward. As Captain Michaelsen said:



"Q. Suppose when it was foggy you hove to and waited, you could have saved fuel oil in that way, could you not?

"A. Well, I could not lay on the ocean with a northwest sea and wind without using my engine.

"Q. You could have gone very slowly?

"A. I would not do it as master of a vessel. First of all, with a loaded vessel, she will go sideways and I will either lose my housing or my deck-load. The only way of holding the vessel is either to hold her before it or put the bow on the sea. That is according to my experience. I have had experience since I was thirteen years old. I never saw anybody stop a vessel on the ocean with a sea and wind" (p. 136).

It would not do to run the ship south even at her slowest speed, for she would run away from the barge. The only thing to do was to proceed north trying to see her if possible in the darkness, and then turn south in the morning after it was certain that the "Hardy" was north of the barge, and come up behind her in the daylight. This course was followed by the "Hardy." *A look-out for the barge was kept throughout the entire night*, but it was not expected that she could be seen, and it would have been almost impossible to have boarded her. In fact, it was as important to keep a sharp lookout in order to avoid running into the barge as it was to find her (p. 134). At daylight, when north of where he lost the barge, Captain Michaelsen turned and ran in a southerly direction. He zig-zagged in and out, keeping a sharp lookout for the barge (p. 135). The crew were all

looking for the barge; the captain went up in the rigging with glasses every time the fog lifted (p. 148). Captain Michaelsen figured "the barge would drift in towards shore, making south" (p. 139); or in other words, would drift about "southeast by east" (p. 139). And in passing it might be said that the accuracy of the Captain's judgment is shown by the fact that Captain Michaelsen came up behind her and apparently only missed her by being about a mile or so too far in towards shore (pp. 52, 138). These efforts were kept up continuously for hours from 6 A. M. to 11:15 A. M., but without success. The trouble was that a drifting fog had set in, which would lift at intervals only to return (p. 135). This was the sort of fog that often accompanies a north-west wind (p. 135). As Captain Michaelsen said: "at times it is pretty clear and you can see a little ways, and at other times it sets in foggy again."

It was at about 8:30 A. M. that the steamer "Watson" passed the "Hardy" about a mile inside the latter. The fog had lifted to some extent about 8 A. M. and remained so for about half an hour (p. 135). Captain Michaelsen, however, was not able to see the "Watson" a mile ahead of him. After the "Watson" had passed the "Hardy" about two miles, Captain Michaelsen saw her for about five minutes, and then the fog set in again (p. 135), and she was out of sight (p. 114). It was of course far more difficult to see the barge than to see the "Watson"

(p. 113). The barge had only about 5 or 6 feet free-board, and she would lie in between the swells (pp. 113, 114). Often it is only possible to see the masts even of vessels. The fact that the "Watson" had white painted houses made it easier to see her (p. 114). The density of the fog is shown by the fact that though Captain Michaelsen saw the "Watson," a larger ship than the "Hardy," the officers of the "Watson" did not see the "Hardy" (p. 57), which was formerly known as the "Grace Dollar." Counsel for appellants would make it appear that there was no fog on September 7th, but the testimony of Captain Brennan of the "Watson," a witness for appellants, supported the testimony of Captain Michaelsen. The log of the "Watson" showed that fog had set in at 7:50 A. M. (p. 58). And the "Watson" was miles south of the "Hardy," from whose direction the fog was drifting. So the fog would have reached the steamer "Hardy" first.

The "Hardy" continued zig-zagging south looking for the barge until 11:15 A. M. At that time she actually was some miles south of the barge. It will be remembered that the "Watson" saw the barge at 7:05 A. M. (p. 59), and that at that time there was no fog in the vicinity of the "Watson." The "Watson" lost about twenty minutes in going out of her way to look at the barge (p. 59). At 8:30 A. M. the "Watson" had passed the "Hardy" (p. 113), so that about one hour after the "Watson" saw the barge



she passed the "Hardy." The record does not disclose at what speed the "Watson" was traveling. The only evidence on the subject is the statement of Captain Michaelsen that it took the "Watson" about 15 minutes to go about 3 miles (p. 135). At that rate the barge was about twelve miles south of the "Hardy" when the "Watson" was seen. There can be no doubt therefore that the "Hardy" was some miles south of the barge at 11:15 A. M.

We think that the foregoing summary of the evidence is convincing that the "Hardy" made a careful search for the barge and did everything she could to find her from the time she was lost at 12:40 A. M. to 11:15 A. M. on September 7th. But counsel for appellants contend that the "Hardy" should have continued searching after 11:15 A. M., and that she was grossly negligent in then giving up the search. Let us see if the evidence supports the charge.

At 11:15 A. M. Captain Michaelsen had about 60 barrels of fuel oil left (pp. 137, 155). Of this amount about five barrels were not available, because the suction pipes would not go down to the bottom of the tank (p. 156). These 55 available barrels were sufficient to take him in to San Francisco and leave him 15 barrels on which to rely in case of emergency, such as a southwest storm, which is not at all infrequent at that time of the year. And indeed Captain Michaelsen had just 20 barrels left, of which 15 were available, when he reached San Francisco (p. 114).

And it would not have been safe to have attempted the remainder of the voyage with less than a *margin* of 15 barrels. As the engineer of the "Hardy," K. Knudson, testified:

"Q. So that the most you would have available would be about 15 barrels?

"A. Yes, sir, something like that.

"Q. What would you consider with regard to the safety of the vessel, as to the reasonableness of coming in or attempting to make port with a less surplus than that?

"A. Well, I would not take the chance of having any less in case of a head wind and sea, I would want something to work on.

"Q. You don't think it would be good seamanship to do that, is that the idea?

"A. That is the idea" (p. 156—see also p. 115).

At 11:15 A. M. Captain Michaelsen was certain that he was south of the barge, which undoubtedly was the case, as we have previously shown. But he had absolutely no way of telling how far south of her he was. The currents might have taken her further east or west than he had figured, or he might have passed her hours before in the early morning fog. The fog was still on. Counsel for libelants would make it appear that at 11:15 A. M. the weather was entirely clear, and he relies on the following testimony of Captain Michaelsen:

"Q. Did it begin to clear at 11:15 a. m. as noted in the log?

"A. At 11:15 a. m. it was clearing, that is, you could not call it clear, but it is what we would

call clear enough that we did not have to blow our steam whistle.

“Q. It was cleared up?

“A. It was clear enough so that we did not have to blow our steam whistle. We could see for a mile or two around us.

“Q. That was the very time you started back to San Francisco, was it not?

“A. That was the very time” (p. 136).

We submit that the foregoing testimony shows that the “Hardy” was still surrounded by fog. Captain Michaelsen could not see more than a mile or two around him. To anyone who is at all familiar with the sea it would be ridiculous to maintain that weather is clear when you can see at the most two miles. The drifting fog was still on, and it might at any time set in more heavily. In a limited time the chance was very slim of finding a barge adrift on the ocean when the range of vision was confined to a distance of two miles.

Every mile to the northward meant using oil for two miles. At that rate it would not be long before the margin of oil on the “Hardy” would be consumed. In that event, if a storm from the south should arise, the speed of the “Hardy” would be so retarded by wind and sea that her fuel oil would be consumed before she reached port. She would then lose all headway, and would be sidewise to wind and sea, in the trough of the waves, in imminent danger of losing her housing and deck cargo, and possibly of being capsized. By reducing his margin



of fuel oil in spending further time in search for the barge, Captain Michaelsen would be risking his steamer, her cargo, and the lives of his crew.

Such was the situation that confronted Captain Michaelsen at 11:15 A. M. on the morning of the 7th of September. Should he continue his search longer, or was it the part of wisdom to continue south? Did the chance of finding the barge warrant the risk involved? These were the questions that Captain Michaelsen was called upon to answer. He had searched diligently for eleven hours without success, and he was still confronted with the same weather conditions that had contributed to his failure to find the barge. He had absolutely no means of knowing whether the barge was north, east, or west of him. His engineer had advised him that he had then but a safe margin left on which to reach San Francisco. In view of the foregoing it is obvious how little foundation there is for appellants' charge that Captain Michaelsen was negligent in discontinuing the search. The tug was only bound to employ those means of rescuing the barge which were consistent with her own safety (38 *Cyc.*, 566; "*The Mosher*," 17 Fed. Cas. No. 9874). If anything further were needed, in addition to the facts already outlined, to demonstrate how earnest and determined Captain Michaelsen was in his efforts to find the barge, we would call the Court's attention to the risk and responsibility which Captain Michaelsen assumed

when a few moments after the hawser parted, in the teeth of a northwest wind and heavy sea, with a heavy deck-load, he turned his ship about and steered north. We contend that there is absolutely no basis for the charge of negligence against Captain Michaelsen. On the contrary we maintain that in these circumstances the decision of Captain Michaelsen to proceed south was not only proper, but was the only decision which seamanship and good judgment would justify. Captain Michaelsen owed a duty not only to the owners of the barge, but also to the owners of the ship and her cargo. And he owed even a greater duty to his crew.

But, say counsel for appellants, though this may be so, still respondent was negligent in not having more oil on board. There is no merit in such a contention. The "Hardy" had been making the trip between Coos Bay and San Francisco week in and week out for months and months, and the slowest voyage she had ever made in the heaviest winds and seas she had ever encountered had been made in 72 hours (p. 137). The "Hardy" uses 42 barrels of fuel oil every 24 hours, or  $1\frac{3}{4}$  barrels every hour (p. 137). Hence even on the unusual voyage which required 72 hours, 126 barrels of oil was sufficient. And the voyage involved in the action was made in 61 hours (Ans. to Inter. 6 on p. 21), and would have been made in 50 hours, if 11 hours had not been lost in searching for the barge. Yet the "Hardy" had at least 134 barrels

of oil on board when she left Coos Bay, or 8 more barrels than experience had shown would be required by her slowest trip. There is no direct testimony as to this fact, but the evidence demonstrates that such must have been the case. At 11:15 A. M., September 7th, the "Hardy" had been at sea  $42\frac{1}{4}$  hours, and though from 12:40 A. M. to 6 A. M. on September 7th she had been going northward at only half speed, still she had been bucking wind and tide which would greatly increase the oil consumption (p. 137). At the rate of 42 barrels per day there had therefore been consumed up to that time about 74 barrels. At that time the engineer, K. Knudson, sounded the tanks and found that there still remained about 60 barrels of fuel oil (pp. 137, 155). Hence the "Hardy" must have had on board when she left Coos Bay at least 134 barrels of fuel oil. And this amount, as before stated, was more than she had required on her slowest trip. The fact that she was towing a barge made no difference. Appellants themselves testified that the barge was easy to tow (p. 68), and the engineer of the "Hardy" testified that the barge "didn't make any difference to the speed" of the ship (p. 154). This testimony is cited with approval by counsel for appellants (App. Br., pp. 16, 25). Counsel for appellants would make it appear that Captain Michaelson stated that he considered it prudent to carry between 260 to 280 barrels of fuel oil on the single trip from Coos Bay to San Francisco. Captain Michael-



sen was referring to the round trip from San Francisco to Coos Bay and back again. That such was the case is shown by the fact that the chief engineer testified that he considered 130 to 140 barrels of oil sufficient to carry on the voyage from Coos Bay to San Francisco (p.158). This is just half the amount mentioned by the captain and the engineer and master could not reasonably be so far apart in their estimates. Obviously the master had in mind the round trip. Both master and engineer then thought it was prudent to carry between 130 to 140 barrels on a single trip, and that was done on the voyage when the barge was lost. The "Hardy" was therefore perfectly seaworthy when she left Coos Bay. There is nothing inconsistent in the statement that the oil supply made it prudent to discontinue the search at 11:15 A. M. on September 7th, and the statement that the "Hardy" had ample oil on board when she left Coos Bay on September 5th at 5 P. M. The "Hardy" at 11:15 A. M. had *already* spent  $11\frac{1}{4}$  hours searching for the barge. *That fact alone showed that she carried a safe margin of oil. It was the fact (and the very fact that counsel for appellants calmly ignore) that there were still 145 miles to go (p. 56) and that emergencies might still arise, that made it necessary for the "Hardy" to proceed for home.* The "Hardy" had enough oil to last her at least 76 hours when she started, and experience had shown that she could make the trip in 72 hours under the worst conditions,

and the tow made no difference in her speed. We fail, therefore, to see wherein the "Hardy" was unseaworthy, or wherein her captain or engineer was careless or negligent.\*

Up to this point we have met appellants on their own ground. We have met their various contentions that appellees were negligent, and have endeavored to show that the officers of the "Hardy" were not only *not* negligent, but that in the problems before them they exercised sound judgment and did what was the proper and prudent thing to do. And in passing we might point out that the observation made by the Court in "*The Czarina*," 112 Fed., 541 (see *infra*, p. ), is equally applicable here, namely, that appellants totally failed to produce any witness to testify that the master had been negligent and incompetent. It seems to us that if Captain Michaelsen was as careless and incompetent as appellants would make us believe, that there should have been no difficulty in obtaining seafaring men to declare that Captain Michaelsen did not act under the circumstances as a prudent navigator would have done. But we now wish to urge upon the Court that if now, looking

---

\* Counsel criticizes the "Hardy" for not taking the tow to Fort Bragg or going there for help. There is absolutely nothing in the record to show that the "Hardy" could have gone to Fort Bragg or if she could have got into that place that she could there have obtained fuel oil or assistance; or that oil or assistance, if obtainable, could have been had before the barge went ashore. There is not a word of evidence in the record touching on the question of the "Hardy" going to Fort Bragg. That was a matter on which evidence, if they desired to raise it, should have been offered by counsel at the trial. Obviously, with no evidence on the subject before this Court, it can not be raised in the briefs.

back after the episode is all over, it should appear that Captain Michaelsen erred in any one or more of his decisions, that fact does not impute negligence to appellees. There is a vast difference between deciding upon a course of action at the time the emergency presents itself and in seeing what might better have been done after the emergency is over. It is easy to argue that the lamp should have been relit after the 10-inch hawser broke in the dark and a fog set in, even though there was a heavy sea and wind. It is easy to maintain that the "Hardy" should have continued searching for the barge some time longer when it is known from Captain Brennan of the "Watson" just where the barge was tossing. A tug will not be held liable for a mistake or an error of judgment when the course pursued was one that a competent navigator might reasonably pursue. As stated in the article on Towage, 38 *Cyc.*, 567:

"Where the master of a tug is an experienced and competent man, much must be left, as occasion arises, to his judgment and discretion in the management of the tow; and a mere error of judgment on his part will not render the tug liable for the loss of her tow, unless the error was so gross that it would not have been made by a master of ordinary prudence and judgment."

*The Startle*, 115 Fed., 555;

*The Fred. E. Ives*, 169 Fed., 902;

*The Czarina*, 112 Fed., 541;



*The Britannia*, 140 Fed., 985;  
*The Covington*, 128 Fed., 788;  
*The Garden City*, 127 Fed., 298;  
*The E. Luckenbach*, 109 Fed., 487;  
*The Taurus*, 95 Fed., 699.

As said by the Court in *The Wilhelm*, 47 Fed., 89:

“Hypercritical scrutiny into the conduct of the navigation, after the event of the disaster and in the light of that which has happened, is not the test of negligence, but prudent judgment is to be tested by the circumstances as they appeared to the master at the time he was called to act, and not as they appear to the Court after more critical scrutiny than the master could have given to them.”

Or as stated by the Court in *The Hercules*, 73 Fed., 255:

“A tug is not to be held liable for the loss of a tow merely because her master, in an emergency, did not do precisely what, after the event, others may think would have been best. If he acted with an honest intent to do his duty, and exercised the reasonable discretion of an experienced master, the tug should be exonerated.”

In “*The Czarina*,” 112 Fed., 541 (District Court, N. D. of Cal.), decided by Judge De Haven, the facts are very similar to those in this action. In a northwest wind and sea the tug lost its tow by the breaking of the hawser a few miles south of where the “Hardy” lost the barge. The captain of the tug did not believe it was prudent to attempt to board the

tow in such a sea in order to refasten the hawser, and he considered it dangerous to his ship to lie alongside of the tow during the night. He therefore abandoned the tow and went to Point Arena. The next day when he returned to look for the tow a heavy fog had set in and he could not find the tow. It was contended that the tug was negligent in abandoning the tow and not staying in the vicinity of the tow during the night and keeping her in sight until the wind and sea went down. Judge De Haven said:

“Undoubtedly, when the hawser parted it devolved upon the master of the ‘Czarina’ to exercise his judgment as to what ought to be done,—whether to stand by the raft so long as he could do so with safety to his vessel, or to proceed immediately to the shore. The condition which confronted him was this: A valuable raft was adrift, a strong northwest wind blowing, and the condition of the sea was such that, in his opinion, the raft could not be recovered during the day. He did not think it safe to remain near it during the night, or that, if he should attempt to do so, he would be able to keep it in sight. Under these circumstances, it was his judgment that he could render no service to the raft by remaining with it during the day, and that the best course to pursue was to immediately communicate with his owners, in San Francisco. In acting upon this determination, I do not think it can be said that he committed any error,—much less, a gross error of judgment,—and there is nothing in the evidence which tends to show that, if a different course had been pursued, the raft could have been kept in sight during the night, or that it probably would have been recovered sooner than it was. In the presence of weather and sea

conditions such as then prevailed, a master of ordinary skill could certainly form a reasonable judgment upon the question of whether it was probable that the wind would so moderate during the day as to make it possible to pick up the raft before night; and it certainly has not been shown that the master of the 'Czarina' was mistaken in the judgment which he formed in relation to that matter. *Upon the question whether a prudent master, surrounded by the same circumstances, would have pursued the same course, the evidence of experienced navigators would have been competent.* (*The Frederick E. Ives*, 25 Fed., 447.) *No witness of that character testified that the master of the 'Czarina,' in leaving the raft, did what a prudent and careful navigator would not have done under like conditions.* The raft, although a large body, only floated twelve feet above the water; it had no lights upon it; and, conceding that it would have been possible for the 'Czarina' to have kept so near to it during the night as to have held it constantly in view, to have done so would certainly have been attended with great danger. . . . It must be remembered that the 'Czarina' is not to be held to the responsibility of an insurer that the enterprise of towing the raft would be successful, and carried through without loss. Her obligation was to use ordinary care and diligence to bring the raft safely to San Francisco, and this obligation imposed upon her the duty to make proper efforts to recover it when the hawser parted, and for this purpose to stay by it so long as there was any reasonable probability that by so doing it could be saved. But the 'Czarina' cannot be held liable for the subsequent loss of a portion of the raft, before it was finally recovered, 'because the master in an emergency did not do precisely what, after the



event, others may think would have been best' (*The Hercules*, 19 C. C. A., 496, 73 Fed., 255)."

We submit that the case just cited, "*The Czarina*," is conclusive in favor of respondent. If the abandonment of the tow in that case did not constitute negligence we fail to see how Captain Michaelsen's abandonment after a search of 11¼ hours constituted negligence. Both captains were confronted with similar problems, involving the safety of their ships, and it seems to us that the danger that presented itself to Captain Michaelsen was much more imminent, and that therefore if either committed any error that of the captain of the "Czarina" was much the greater.

In determining the question of negligence in this case this Court must not only give weight to the judgment of Captain Michaelsen, whose competency is not attacked, but it must also give consideration to the decision of the lower court. While the hearing before this Court is in the nature of a trial *de novo*, "the  
" rule has been well established in cases in admiralty  
" in this Court (U. S. Cir. Ct. of App., Ninth Cir.),  
" and, as we believe, in the Supreme Court of the  
" United States, that where objection to a decision is  
" that it is based upon a fact found by the lower  
" court upon conflicting testimony, or upon the testi-  
" mony of witnesses whose credibility is questioned,  
" the decision of the lower court will not be reversed  
" unless it clearly appears that the decision is against  
" the evidence" (Judge Morrow in *Jacobsen vs. Lewis, etc. Co.*, 112 Fed., 73).

See also:

1 *Corpus Juris.*, p. 1350, notes 18 and 19.

On every distinct charge of negligence made by appellants there is a conflict of testimony unless when appellants produced no testimony at all. Every charge of negligence made in appellants' opening brief in this Court was pressed in their brief in the lower court. Counsel attacked in the lower court just as virulently as they have in their brief in this Court the veracity and integrity of appellees' witnesses. In fact, the brief filed by counsel in this Court is, with a few slight changes, the brief filed by them in the lower court. With every point presented to it that has been urged here the lower court decided on the conflicting testimony in favor of appellees, and, being in a position to judge (most of the witnesses having appeared before it), by rendering its decision exonerating appellees from every charge of negligence made, expressed its faith in the credibility and integrity of the witnesses for appellees.

Upon the judgment of a competent master and the findings of the lower court upon a mass of conflicting testimony we might well urge this Court to follow its established rule and affirm the decree of the lower court. But we do not rest our case on the proposition that appellees are not liable for an error of judgment of a competent master, or upon the finality of the findings of the lower court. Our position is that a

close study of the case upon its merits, of the situation that confronted Captain Michaelsen from the moment the light went out until he finally gave up the search, will clearly exonerate appellees from all blame for the loss of the tow. We believe that the evidence has not only shown that Captain Michaelsen was not guilty of any negligence in not relighting the lamp and in discontinuing the search, but that in the situation which confronted him he took the only course which a competent navigator would take who had a proper appreciation of the responsibility which lay upon him to protect and preserve his cargo, his ship and the lives of his crew.

Respectfully submitted.

W. S. ANDREWS,  
Proctor for Appellees.





# United States Circuit Court of Appeals

For the Ninth Circuit

K. V. KRUSE and R. BANKS, copartners  
doing business under the firm name of  
"KRUSE & BANKS SHIPBUILDING COMPANY"  
(a corporation), on behalf of themselves  
and their underwriters,

*Appellants,*

vs.

M. J. SAVAGE, EDW. J. MORSER,  
JAMES H. HARDY, INC., JAMES H.  
HARDY, HANS MICHELSON, MRS. F.  
RULFS and DR. ALEXANDER WAR-  
NER, claimants of the American steamer  
"Hardy", her tackle, apparel and fur-  
niture,

*Appellees.*

**Filed**

OCT 22 1915

F. D. Monckton

clerk

## BRIEF FOR APPELLANTS.

E. B. McCLANAHAN,

S. H. DERBY,

*Proctors for Appellants.*

*Filed this.....day of October, 1915.*

FRANK D. MONCKTON, *Clerk.*

*By.....Deputy Clerk.*





No. 2618

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

K. V. KRUSE and R. BANKS, copartners  
doing business under the firm name of  
“KRUSE & BANKS SHIPBUILDING COMPANY”  
(a corporation), on behalf of themselves  
and their underwriters,

*Appellants,*

vs.

M. J. SAVAGE, EDW. J. MORSER,  
JAMES H. HARDY, INC., JAMES H.  
HARDY, HANS MICHELSON, MRS. F.  
RULFS and DR. ALEXANDER WAR-  
NER, claimants of the American steamer  
“Hardy”, her tackle, apparel and fur-  
niture,

*Appellees.*

## BRIEF FOR APPELLANTS.

---

This is an appeal from a decree of the District Court for the Northern District of California dismissing a libel against the steamer “Hardy” for negligent towage,

by reason of which libelants' (appellants') barge was lost, went ashore and had to be salvaged and repaired. We will first state the clear and undisputed facts and then outline our contentions, under which we can easily take up the few disputed facts and the questions of law applicable to the same.

---

### **General Statement of Undisputed Facts.**

It is either admitted or absolutely established that the master of the steamer "Hardy" undertook to tow a barge, which had been built by the libelants, from Coos Bay to San Francisco; that she left Coos Bay with said tow (which had no one on board) at about 5 p. m. on September 5th, 1913; that said barge was in all respects staunch, strong and seaworthy and an especially easy barge to tow; that it was equipped with a proper light with sufficient oil to burn for sixty hours, and that extra oil was supplied by libelants to be used when that gave out; that said light went out at about 6:15 p. m. on said September 5th and was not thereafter relit; that at some time during the night of September 6th, or the very early morning of September 7th before 1 a. m., the tow line parted and the barge went adrift; that no search was made for said barge before at least 6 a. m. of September 7th (Record, pp. 133-134); that at 11:15 a. m. of September 7th the search was given up and the "Hardy" proceeded to San Francisco, where she arrived on September 8th, thus having been occupied about 61 hours on the voyage. The barge later drifted ashore on the rocks near Caspar, just below Fort Bragg, and was

badly damaged. She was salved by the steamer "Brunswick" for \$1,000 and brought into San Francisco (pp. 94-95) where she was repaired (p. 96).

---

### **The Lower Court's Decision.**

The decision in the case, rendered several months after the trial, is very brief and reads as follows:

"In this case my conclusions are as follows:

1. That libelants furnished the hawser to the steamer 'Hardy' for the purpose of towing their barge to San Francisco, and that the 'Hardy' was not responsible for the parting of such hawser, which was the real cause of the loss of the barge;

2. That it was for the captain of the 'Hardy' to determine whether or not light on the barge could have been relighted without danger of losing his men in the attempt, and the evidence shows that the possibility of such danger was so great that the court will not review the action of the captain in that regard.

3. The loss of the barge under all the circumstances was discovered as seasonably as could reasonably be expected.

4. The 'Hardy' was not negligent in failing to keep up a longer search for the barge.

For these reasons a decree will be entered in favor of respondent" (pp. 170. 171).

---

### **The Assignment of Errors.**

This assignment is as follows:

"I.

That the court erred in holding and deciding that the libelants furnished the hawser to the steamer



‘Hardy’ for the purpose of towing their barge to San Francisco, and that the ‘Hardy’ was not responsible for the parting of such hawser; and in not holding and deciding that the master of the ‘Hardy’ himself furnished said hawser and in not holding the ‘Hardy’ responsible for the parting thereof.

## II.

That the court erred in holding and deciding that the parting of said hawser was the real cause of the loss of said barge.

## III.

That the court erred in holding and deciding that the possibility of danger in relighting the light on the barge was so great that it would not review the action of the master of the ‘Hardy’ in not relighting the same, and in not holding and deciding that the ‘Hardy’ was negligent in not relighting said light and that such negligence was one of the proximate causes of the loss of libelant’s barge.

## IV.

That the court erred in holding and deciding that the loss of the barge was discovered by those on board the ‘Hardy’ as seasonably as could reasonably be expected, and in not holding and deciding that the ‘Hardy’ was negligent in not sooner discovering the loss of said barge and that such negligence was one of the proximate causes of the loss of said barge.

## V.

That the court erred in holding and deciding that the ‘Hardy’ was not negligent in failing to keep up a longer search for said barge, and in not holding and deciding that the ‘Hardy’ was negligent in this respect, and was also negligent in making an absolutely insufficient search for said barge, and that said negligence was one of the proximate causes of the loss of said barge.

## VI.

That the court, in holding that the 'Hardy' was not negligent in failing to keep up a longer search for said barge, failed wholly to note that the 'Hardy's' only excuse in that respect was that she had insufficient fuel oil to do so, and in not holding and deciding that such insufficiency rendered the 'Hardy' unseaworthy for her voyage with said barge in tow, and hence rendered her liable for the loss of said barge.

## VII.

That the court erred in not holding and deciding upon the pleadings and the evidence that the 'Hardy' was responsible to libelants for the losses suffered by them in the above cause.

## VIII.

That the court erred in making, rendering and entering a final decree herein dismissing the libel with costs, and in not making, rendering and entering an interlocutory decree in favor of libelants referring the case to a Commissioner to ascertain the damages of libelants (pp. 174-176).

---

**Contentions of Appellants.**

Under the foregoing assignment we shall contend:

1. That, under the circumstances of this case, the burden of proof was on the "Hardy" to relieve herself from a presumption of negligence, which said circumstances placed upon her.

2. That the court's finding that the libelants furnished the towing hawser introduces an immaterial element into the case, and that its further finding that the parting of the hawser was the proximate cause of the loss of the barge is clearly erroneous. We shall

also take up in this connection the contention of appellees that the libelants assumed all risks of the towage.

3. That the "Hardy" was negligent in not relighting the light on the barge after it went out.

4. That the "Hardy" was negligent in not sooner discovering that the barge was adrift.

5. That the "Hardy" was *grossly and inexcusably negligent* in failing to make a proper or sufficient search for said barge, and that her only excuse for not so doing, if correct, rendered her unseaworthy for her voyage and hence equally liable.

We believe that the arguments to be advanced under the foregoing headings will show that libelants have a just and meritorious case, which calls for a reversal of the decree.

---

## I.

### THE BURDEN OF PROOF WAS ON THE "HARDY".

It is admitted that a ship undertaking a towage service is neither a common carrier nor an insurer, but is simply bound to use ordinary care. The rule is well stated by the Supreme Court as follows:

"The tug was not a common carrier, and the law of that relation has no application here. She was not an insurer. The highest possible degree of skill and care were not required of her. She was bound to bring to the performance of the duty she assumed reasonable skill and care and to exercise them in everything related to the work until it was accomplished. *The want of either in such cases is a gross fault*, and the offender is liable



to the extent of the full measure of the consequences.”

*The Margaret*, 94 U. S. 494; 24 L. Ed. 146, 147.

In the case of *The Pejepscot*, 217 Fed. 150, 152, Judge Hale says of the master of a towing vessel:

“He must use the ordinary prudence and judgment *called for by the circumstances of the case*. If the duty undertaken by him is difficult, *he must use commensurate care and skill.*”

It is true that in ordinary cases the burden of proving negligence rests on the tow, although it is very often held in such cases that very little evidence is necessary to sustain such burden of proof (28 *Encyc. Law*, 2 ed., p. 275). It has been held, however, that where a tow which has no one on board, arrives in a damaged condition, a presumption of negligence arises against the towing steamer, which calls on her for an explanation.

*The Seven Sons*, 29 Fed. 543, 544.

See also

38 *Cyc.*, 585, note 64, and cases there cited.

It is submitted that the same rule applies in the case at bar. The tow had no one on board. All the facts in regard to her loss, the subsequent search for her, and the failure to pick her up, rest solely in the knowledge of those on board the “Hardy”. It is only fair, therefore, following the above authorities and other well known legal analogies, that the “Hardy” should be called upon for a full and consistent explanation of all that occurred, and that the burden of proof should rest strongly on her to justify herself. We believe, with all due respect to the lower court, that

she not only failed to sustain this burden, but that a clear case of negligence in several respects was made out against her.

---

## II.

**THE COURT'S FINDING THAT THE LIBELANTS FURNISHED THE TOWING HAWSER IS IMMATERIAL, AND ITS FINDING THAT THE PARTING OF THE HAWSER WAS THE PROXIMATE CAUSE OF THE LOSS IS ERRONEOUS. HEREIN ALSO OF THE CONTENTION THAT LIBELANTS ASSUMED ALL RISKS OF THE TOWAGE.**

The first question which arises in the case is as to who furnished the hawser with which the towing was done, but, as we shall show, this is a very immaterial matter. Captain Michaelson says that Banks agreed to supply the tow line and in fact agreed to take all responsibility off his hands, both of which statements Banks absolutely denies, although he admits that he told him that he (Michaelson) could get a line from the Simpson Lumber Company (Banks, p. 75). Mr. Falkenstein of the latter concern says that Banks called him up and asked "if the 'Hardy' could have a tow line to tow the barge to San Francisco" to which Falkenstein replied that he (Banks) would have to see Captain Simpson about it (Falkenstein, p. 43). Falkenstein only remembers one conversation about a line and knew of another barge being towed later (*id.*, p. 45), and Banks admits that he did apply for a line for the steamer "Iaqua" to tow the second barge with (Banks, p. 76). Moreover, Captain Simpson, when called, did not testify to any application made by Banks

to him for the line, but simply to his telling Falkenstein that it was all right (Simpson, p. 47). He further testified that the captain of the "Hardy", before starting on the trip, asked him "if he was going to charge him for the use of the line" (id). We submit that the captain would hardly have asked this, if Banks had agreed to supply the line, and his explanation as to why he did so is weak and unsatisfactory (Michaelson, pp. 117-118). It is further in evidence that no bill was ever sent to Kruse & Banks for the line (Banks, p. 80) and, moreover, the evidence of Falkenstein that Banks asked him "if *the 'Hardy'* could have a tow line" is hardly convincing evidence that he proposed to pay for such line. We have recited this evidence in order that the court may not be in any way misled as to this issue, for it really has little bearing on the case. It is well settled law that it is the duty of the towing steamer, and not the tow, to see that the towing lines are sufficient in length and quality.

*38 Cyc.*, 569;

*The Edwin Terry*, 145 Fed. 837, 839;

*Re Moran*, 120 Fed. 556, 558.

In the last case cited the court expressly held that, even if the tow supplied the line, it still remained the duty of the tug to see that the line was sufficient, saying on this point:

"The tug then went alongside of the dredge, and received from her an 80 fathom 6-inch line \* \* \* upon the offer of the dredge, as the tug claims; upon the request of the tug's captain, as some of the crew of the dredge state. If the use of this line imputes fault to anybody, as it does not, the master of the tug was the final judge of its sufficiency."



We do not, however, make the contention on this appeal that the "Hardy" was negligent in the use of the hawser in question, for it was apparently a sufficient one. The breaking of hawsers on long tows is an everyday occurrence and one that all tugs should be prepared to meet. The main point we wish to make is that, if anyone has to bear the consequences of the parting of the hawser, it is not the libelants but the "Hardy"—and this irrespective of the question as to who furnished the hawser. It is impossible to tell from the lower court's opinion what importance it attributed to its finding that libelants furnished the hawser, but the finding itself has no significance whatever.

The lower court went much further, however, and found that the parting of the hawser was the proximate cause of the loss of the barge. We quite agree that *if* the "Hardy" took proper precautions to protect her tow *before* the hawser parted, and *if* she made sufficient efforts to save her *after* it parted, then the breaking of the hawser *was* the proximate cause of the loss. *If*, however, the "Hardy" neglected such proper precautions, or omitted such sufficient efforts, the mere parting of the hawser cannot excuse her. A tug's duty to her tow goes much further than the furnishing of a towing hawser, and it does not cease after the breaking of such hawser. Her duty to do all that is possible for the safety of the tow remains continuous from the time the voyage commences until the tow is past all danger. Authorities in this con-

nection will be cited under the last and most important heading of this brief.

The next point we wish to meet before going to the real merits of the case is the claim that it was agreed that the tow should be solely at the risk of libelants. Banks absolutely denies making any such agreement (Banks, pp. 74-75) and all Captain Michaelson says is as follows:

“I told Mr. Banks that I would take no chances or no risks on that towing. I told him I would do my best and try to get it down, but I would take no risk on it.”

Michaelson, p. 106.

We submit that this statement is entirely too vague to constitute a solemn contract that the tow was to be at the risk of the libelants, and we certainly do not feel that the court will find that any such contract was made in view of the positive denial of Mr. Banks, who certainly showed up favorably as a witness in comparison with Michaelson. And it of course goes without saying that the burden is on the “Hardy” to establish that any such agreement was made.

Here again, however, the discussion is rather beside the point, for it is well settled that a towing vessel is responsible for negligence, even though it be expressly agreed that the towing is to be at the tow’s risk.

*The Syracuse*, 12 Wall. 167; 20 Law Ed. 382;  
*The American Eagle*, 54 Fed. 1010;

*Re Moran*, 120 Fed. 556, 558;

*Alaska Com. Co. v. Williams*, 128 Fed. 362, 366  
(C. C. A., 9th Circuit).

The alleged agreement, therefore, has absolutely no bearing on the issues of this case, but we respectfully submit that Captain Michaelson's testimony in regard to it is simply one of his many exaggerations, which exaggerations discredit his whole story.

---

### III.

#### THE "HARDY" WAS NEGLIGENT IN FAILING TO RELIGHT THE LIGHT ON THE BARGE AFTER IT WENT OUT.

The first main fault which libelants charge against the "Hardy" is the failure to relight the light on the barge after it went out. In the answer to interrogatory number 8, made, of course, long before the trial, the claimants say that the light went out at about 6:15 p. m. on September 5th, or an hour and fifteen minutes after the "Hardy" left her dock (p. 22). In fact, if the positive testimony of Mr. Kruse to the effect that the barge left at 5:10 p. m. (p. 40) be correct, she made the trip to the bar in an hour and five minutes. The answer to interrogatory number 7 sets out that the "Hardy" made between 6 and 7 knots with the barge in tow (p. 21), which was accelerated in Captain Michaelson's testimony to seven and three-quarters knots (p. 120). Mr. Banks testifies that vessels generally go slow in getting to the bar (pp. 166-167), and he is corroborated by the "Hardy's" log, which shows



not a single trip, besides the one in question, when such fast time was made, and also shows that it generally takes about an hour and three-quarters (Libelants' Ex. C, not printed). The point is that, if the light went out before the bar was reached, there would have been no possible excuse for not relighting it in the inner bay. Captain Michaelson says that "sometimes" he has to hurry up to catch the tide, but he shows no reason why he should not have taken plenty of time on this particular voyage.

Several of appellees' witnesses in this case testify expressly that the light went out while the "Hardy" was going across the bar and the lower court seemed inclined to accept this view, so we shall not further argue this point. We do, however, very seriously dispute the entry in the log opposite 6:15 p. m. reading: "Light on barge went out in crossing the bar. Wind and sea preventing us from lighting it again" (Libelants' Ex. C, not printed. Entries of Sept. 5th). With the aid of a magnifying glass the court will easily note that there has been an erasure here, and it is a fair inference that the original entry simply contained a reference to the wind, weather and sea conditions and that this entry was an afterthought and was in all probability written up for the purposes of this case. It is certainly a somewhat suspicious entry and, taken in connection with the other erasures to be referred to later, it does not give an altogether pleasant odor to appellees' case. Admitting that the light went out on crossing the bar, and that the captain might have put this down, we do not for one moment believe

that it occurred to him then to add the words "Wind and sea preventing us from lighting it again", especially when we consider the lack of any entry of heavy weather on the day following.

Banks testifies in this case that at the time the barge left Coos Bay the weather was good (p. 70). J. Dunson, the keeper of the lighthouse at the entrance of Coos Bay, remembers the "Hardy" going out and stopping outside the bell buoy, and he says that the sea conditions were not bad at all and the wind was light (p. 38). Captain O. P. Britt of the U. S. Life Saving Station at Coos Bay testifies that the condition of the surf *on the bar* was quite moderate and that it was not breaking any (pp. 27-28). He also says that no seas were washing over the barge when she went out, and that in his opinion a boat could have been launched *at sea* off Coos Bay and the tow have been boarded without any risk (pp. 29-30). This is also borne out by the "Hardy's" log which shows "clear" weather and a "moderate sea" from 8 p. m. to midnight on September 5th (Libelants' Ex. C.). It probably also showed the same thing from 6:15 p. m. till 8 p. m. before the entry was rubbed out. We may also add to all this the testimony of Sanne, one of the "Hardy's" crew, to the effect that if it had not been dark they could have managed putting down a boat all right (p. 163). And yet the log says nothing about its being too dark, but simply that the wind and sea prevented the relighting. And finally we have the evidence of Mr. Rosenthal and Mr. Davenport, both reputable business men, to the effect that



Captain Michaelson admitted to them that he did not relight the light because he did not consider it necessary, as the barge was coming along all right, and that he said nothing about it being too rough (Rosenthal, p. 83; Davenport, p. 89). Michaelson himself somewhat bears out this testimony when he says: "Well, it did not exactly worry me a great deal \* \* \* I felt kind of satisfied the tow was in good condition the way she looked to me" (Michaelson, p. 124).

We submit that all of this evidence is overwhelming to the effect that the light could have been easily relit that night, and that the evidence of those on the "Hardy" as to the weather and sea conditions is absolutely discredited by it. Counsel will doubtless claim that it was a matter resting in the captain's discretion and that, if he thought it was too rough to launch a boat, his judgment cannot be questioned. We shall have more to say of this rule later when we come to discuss the main fault of the "Hardy", i. e. her abandonment of her tow entirely. We respectfully submit, however, that the evidence already cited shows that there was no exercise of any judgment, but, on the contrary, shows that Captain Michaelson deliberately chose to go ahead without a light on his tow, simply because he did not want to take the trouble of launching his working boat.

If the court finds the facts to be as we have stated, then we think that negligence sufficient in itself to account for the loss of the barge has been clearly shown. Banks testifies that it is customary to have such lights on barges in towing (p. 78), and Michaelson himself admits that if he had had any chance to relight the light,



he certainly would have done so (p. 110). When Michaelson later hailed the steamer "Beaver", he said that the barge was adrift with no light on her and was a *menace to navigation* (p. 114), although this was explicitly denied by appellees in their answer to interrogatory number 14 (p. 22). Not only was she a menace to navigation, but it was the duty of the "Hardy" to the tow itself to keep the light lit if possible, especially in the night time. The chief engineer testifies in this case that the working of the engines would not be materially affected if the barge went adrift (p. 159) and, if this be so, and the barge was obscured to the "Hardy" by fog or otherwise, the light on her was a very vital matter in order to determine whether she was still in tow. The case at bar also indicates as clearly as any case could the necessity of having the light, for, if she had had a light, her loss would probably have been sooner discovered, and in any event the "Hardy" would probably have been able to have promptly located her. We therefore submit that it was negligence not to have relit the light on the night of September 5th, when, according to the "Hardy's" own log, the weather was clear and the sea moderate (Libelants' Ex. C. Entries of Sept. 5th).

In view of the foregoing we need add very little on the subject of the "Hardy's" continued failure to relight the light on the following day. The members of the "Hardy's" crew testify unanimously that both wind and sea increased and that the conditions were very bad. The court, however, is not bound to accept this testimony and it is certainly contradicted so far as it is humanly possible to contradict such evidence.

In the first place, the "Hardy's" log absolutely fails to disclose any such adverse weather and sea conditions, simply stating that the wind was northwest and the weather clear (Libelants' Ex. C., Entries of Sept. 6th), and claimant's answer to interrogatory number 7 shows that she ran 179 miles on that day or almost 8 miles an hour (p. 21). This is most potent evidence, and Captain Michaelson himself admits that the bad conditions *should* have been recorded in the log (p. 125). They will be found to have been so recorded on other occasions. In the second place, Captain Britt cheerfully admitted in response to appellees' cross-examination that seas would wash continually over the barge in rough weather (p. 29); yet Captain Brennan of the "Watson" says that there was no water in the barge when he saw her the next day (p. 57). It is certainly a remarkable fact that she shipped no water if the conditions were as testified to by the "Hardy's" crew. In the third place, we have the testimony of Captain Pillsbury that, after the barge was salved, both ends of her bridle parted (a much more serious situation than the breaking of a hawser) while she was being towed down in a water logged condition by the "Brunswick" and that, despite heavy seas and a northwest wind, the "Brunswick" succeeded in picking her up (pp. 101-102). As the complement of this we have Captain Brennan's testimony that when he saw her he could have got aboard without any trouble (p. 56). As he expressly put it: "If I was going south, I would have picked her up, believe me; she looked good to me" (p. 55). And finally we have the testimony of Captain Arthur Self that he left Coos Bay on the "Iaqua" the morning after the "Hardy" did



and arrived in San Francisco about the same time, and that during the voyage the weather was comparatively calm, with a smooth sea throughout (p. 23). We therefore submit that the "Hardy's" story as to the weather and sea conditions is not only discredited by her own log, but by independent unbiased testimony; that she could at any time have relit the light on the barge and that her not doing so was negligence, but for which the loss of the barge might well have been averted.

In the lower court counsel for appellees claimed that it did not follow that the light would not have gone out again if relighted, and that, therefore, the failure to relight it was not the proximate cause of the loss. If it was the duty of the "Hardy" to keep a light lit on the barge, which it was towing at the end of a six hundred foot hawser, the failure to so keep it lit was a breach of legal duty. Why was the light placed on the barge at all if it was not to be kept lit? And how can it be assumed that it would have gone out again if it had been relit? The point is that the "Hardy" failed in her full duty to the barge, and it is not for her to be allowed to resort to conjecture and say that the loss *might* have occurred even if she had performed her full duty.

---

#### IV.

#### THE "HARDY" WAS NEGLIGENT IN NOT SOONER DISCOVERING THAT THE BARGE WAS ADRIFT.

The second point which we make against the "Hardy" in this case is that she failed to discover that the barge was adrift as soon as she should have and thus lost her



best chances of promptly locating and saving her. The entry in the log on this subject is as follows:

“Discovered

12:40 Tow Line Parted. Ship was at once

1:00 Hove to. Engines working dead slow” (Libelants’ Ex. C).

In this instance no magnifying glass is needed to show an erasure, and the fact that there was an erasure is also shown by the entry of different times to connect a single sentence. Captain Michaelson got into trouble in explaining *when* he made this correction (pp. 130-131, 140), and he could not tell what was in the log before, nor does the magnifying glass disclose this. To say the least, the action is a trifle shady and it lends verity to libelants’ testimony on the subject. Mr. Davenport says that the line he saw on the “Hardy” was very badly frayed for from 12 to 14 feet and had the appearance of having been towed in the water for a very long time (pp. 88, 91), and he is, to a certain extent, corroborated by Mr. Rosenthal (pp. 83-84). Mr. Davenport also says that the captain of the “Hardy” told him that he had no lookout aft watching the hawser (p. 89). Appellees’ witnesses testify that there was such a lookout, but this testimony is open to grave suspicion for reasons already shown. Moreover, while appellees called the alleged lookout who was on watch up to 12 p. m. on the night in question, they absolutely failed to produce the lookout who was on duty when the barge is said to have broken adrift. The only explanation of this in the record is that one witness *thought* that he was not still with the “Hardy” (p. 160). But this is not the only

coincidence as regards witnesses. While the chief engineer glibly testified that the engines would give no indication of when the tow broke loose, the engineer on watch, though still on the "Hardy", was not called as a witness. The excuse for this was that he could not leave the "Hardy", unless work was stopped (Knudsen, p. 159), which is no excuse at all. The failure to call these very important witnesses clearly raises the presumption that their testimony would have been unfavorable to the appellees.

See

*The Joseph B. Thomas*, 81 Fed. 578, 583;  
*16 Encyc. Law*, 2 ed., 1017.

We submit that Mr. Davenport's evidence, in connection with the erasure in the log and the failure to call two vital witnesses, makes it very apparent that the barge was lost for a considerable period before her loss was discovered, which obviously shows that no proper lookout was kept. It is true that Hultgren, the mate, testifies that he saw the barge astern at about 12:20 a. m. (pp. 145-146), or about fifteen or twenty minutes before her loss was discovered. We doubt the credibility of this evidence, but, even if it be true, there are still fifteen or twenty minutes unaccounted for. Moreover, it was *he* and not the lookout who later discovered that the barge was adrift (p. 146), showing that the latter was not attending to his job.

We submit that the inference is inevitable that the loss of the barge would have been promptly discovered if a proper lookout had been kept, and that it could easily have been located and rescued. It should here be noted

that the “Hardy’s” own log discloses clear weather and a moderate sea at the time in question (Libelants’ Ex. C, not printed).

---

## V.

**THE “HARDY” WAS GROSSLY NEGLIGENT IN FAILING TO MAKE A PROPER OR SUFFICIENT SEARCH FOR THE BARGE, AND HER ONLY EXCUSE FOR ABANDONING THE BARGE, EVEN IF TRUE, RENDERED HER UNSEAWORTHY FOR HER VOYAGE AND HENCE EQUALLY LIABLE.**

The above is the main point in this case. It is our contention that the “Hardy” made an absolutely insufficient search for the barge and abandoned her under most reprehensible circumstances. The lower court found that there was no negligence in this respect, but apparently wholly failed to consider in this connection the utter insufficiency of the excuse offered for such abandonment, to wit: lack of enough fuel oil to permit of further delay.

According to the evidence of the appellees the barge broke adrift at about 12:40 a. m. on September 7th, and the “Hardy” immediately hove to, turned around and proceeded northward until daylight, when she started back to look for the barge, although, according to the log, there is no record of her starting south again till 7:25 a. m. (Libelants’ Ex. C, Entries of Sept. 7th). The evidence also is that the night was very dark, but the log shows that the atmosphere was clear and the sea moderate (Id.). Captain Michaelson of course testifies that it was too windy and rough for him to remain where he



was with a loaded vessel and that he had to go north, which argument has already been met in dealing with the previous proposition. The captain admits that he made no search for the barge that night, saying, "There was no use searching at night for a barge *without a light*" (p. 133); yet, according to the answer to interrogatory number 4, "the efforts (to locate the barge) were continued from 12:40 a. m. until about 11:15 a. m., in all about 11 hours" (p. 21). If our argument on our last point is sound there was no excuse for proceeding north and not at once searching for the barge, but we shall now proceed on the assumption that the wind and sea conditions during the night were as testified to, and that the captain was justified in going north.

The captain further says that when daylight set in it was foggy, though the log shows no fog until 9:10 a. m., and he cheerfully explains his report to the Collector of Customs to the effect that at "8 a. m., same date, fog lifted, and I continued to search for the barge" (report attached to interrogatories, p.14) by saying that it is true that it lifted, *but it only lifted for half an hour* (p. 135), a conclusion no honest man could draw from the report. Even on the assumption, however, that it continued foggy till 11:15 a. m., we find the following remarkable situation as testified to by Captain Michaelson:

"Q. Did it begin to clear at 11:15 a. m., as noted in the log?

A. At 11:15 a. m. it was clearing, that is, you could not call it clear, but it is what we would call clear enough that we did not have to blow our steam whistle.

Q. It was cleared up?

A. It was clear enough so that we did not have to blow our steam whistle. We could see for a mile or two around us.

Q. *That was the very time you started back to San Francisco, was it not?*

A. *That was the very time."*

Michaelson, p. 136.

*In other words, instead of conserving his energies and waiting for it to clear, the captain made a gallant search for the barge in the fog, until it cleared up, and then made a bee line for home.*

If the captain had stayed around a little after the weather cleared there can be no doubt, in our opinion, but that he would have found the barge. Captain Brennan of the "Watson" sighted her at 7:05 a. m. on September 7th right in the fairway and about two miles outside of him (p. 52), and it will be noted that the "Watson" passed the "Hardy" at about 8:30 a. m. about a mile *inside* of her (Michaelson, p. 114). Moreover, the barge was just about where she should have been expected to be at that time, having drifted about 7 miles (Pillsbury, pp. 96-97). A most cursory search after the weather cleared would surely have discovered her, yet the "Hardy" made no efforts in this direction.

It is claimed, however, that the search was not continued because the "Hardy" was short of fuel oil and this is the only excuse offered for giving up the search. It makes little difference in this case whether this excuse is true or false, as we shall endeavor to show later. We believe, however, that it is false. Mr. Davenport expressly testifies that the captain told him that he had oil enough (p. 89), and Captain Michaelson's denial of this



conversation is not very emphatic (p. 115). It is also rather suspicious that, although the chief engineer testified that he sounded the tanks that morning after searching for the barge and found about 60 barrels (p. 155), and although Captain Michaelson said that he knew at 11 a. m. that there were then 60 barrels (p. 137), yet, when libelants asked "How much fuel was on board the 'Hardy' at 11 a. m. on September 7th, 1913?" (interrogatory number 9, p. 14), they received the reply "We cannot say" (answer to same, p. 22). This was neither a fair nor a correct answer, if the facts are as stated by Michaelson and his engineer, but it is certainly an admission at least equivalent to one made in a pleading, and libelants were entitled to take it as true and are entitled to take it as true still. And, if this be so, Michaelson's evidence that he did not have enough fuel oil is utterly discredited, for the answer in question shows that he did not know how much he had. It is our belief that there was *ample* fuel oil and that the testimony to the contrary is false.

Captain Michaelson further testifies that on a trip from Coos Bay to San Francisco the "Hardy" ordinarily carries between 260 and 280 barrels of oil (p. 137), and the engineer says that he would not start for San Francisco with less than from 130 to 140 barrels (p. 158). And Michaelson further says that the "Hardy" uses 42 barrels a day more or less (p. 137). As the voyage in question took only *61 hours*, or two and a half days, we are entirely unable to understand how the "Hardy" ran short, since even on the engineer's estimate she should have had enough oil to steam



on for three and a half days. And it will not do to say that her having a tow made her burn more oil, for the engineer is careful to state that having the barge in tow made practically no difference in the revolutions of the engines (pp. 158-159). All of these facts make it still more clear that there was undoubtedly ample fuel oil on board and that the excuse made was a petty subterfuge to escape responsibility.

We now propose to grasp the other horn of the claimants' dilemma and to proceed on the assumption that the "Hardy's" testimony is true and that she did not *in fact* have enough fuel oil to permit a further delay. If so, she was unseaworthy for her voyage and cannot escape responsibility under her own testimony (*The Undaunted*, 5 Asp. 580, cited *infra*). The voyage in question only took 61 hours, part of which was consumed in steaming at *very slow speed*, as is clearly shown by the log (Libelants' Ex. C) and by Captain Michaelson's testimony on direct examination (p. 112). On cross-examination, when he first saw the purport of this evidence, he tried very lamely to bring his speed up to half speed (pp. 133-134), which testimony, even if true, as it clearly was not, would make very little difference in the case. Michaelson further says: "Sometimes it takes me *seventy-two* hours to come from Coos Bay and sometimes I come in forty hours depending on how I strike the weather" (p. 137); yet, although he thus necessarily needed enough oil to last at least 72 hours; although he had a barge in tow which *might* break adrift, and although the voyage in fact only took

61 hours, he did not have enough fuel oil. Such a situation needs no further comment.

The charge of negligence in sending out an unseaworthy vessel does not even end here, however, for Michaelson says that he did not even ask the chief engineer whether he had oil enough (p. 138), and the chief states that he cannot tell how much oil he had for this trip (p. 157). In fact, when he started on his voyage from San Francisco and filled his tanks, *he did not even know that the "Hardy" was to tow a barge from Coos Bay* (p. 158), which Michaelson should certainly have told him. Finally, if the "Hardy" did not have enough fuel oil to get to San Francisco, she could have gone to a nearer port like Fort Bragg and have got some; instead of which she chose to utterly abandon her tow under no compelling necessity therefor.

In the lower court counsel for appellees contended that Captain Michaelson's testimony as to carrying from 260 to 280 barrels of oil referred to the *round trip* from San Francisco, but the testimony does not support this contention in any way (p. 137). From this he argued that it was prudent to carry 130 barrels on the trip from Coos Bay alone. He then proceeded to point out that, as the "Hardy" had been at sea for 42¼ hours at 11:15 a. m. on September 7th, and as she used 42 barrels a day, she must then have used 74 barrels, and, as she then had 60 barrels left, she must have had 134 barrels for the trip, which was ample for a voyage lasting 72 hours. He then circumnavigated the fact that the voyage in question only took 61 hours by stating that it was necessary to have a

large balance of oil on hand to meet *emergencies* which might arise. This argument not only fails to take into account the fact that from 1 a. m. to 7:25 a. m. on September 7th the "Hardy" was proceeding at "slow" and "dead slow" speed, and therefore could not have used the customary amount of fuel oil, but, accepting it fully, it constitutes the striking admission that, although taking a tow for the first time, the captain had only just enough fuel oil to *safely* complete his voyage and yet he completed it in *61 hours*. This hardly constituted due diligence to make the ship seaworthy for a kind of voyage she had never taken before. Moreover, *why* did she have to go on to San Francisco at once? Why could she not have saved her tow and taken her into Fort Bragg? Counsel undertook to claim that there was no fuel oil to be had in Fort Bragg, although there is not a word of testimony in the record to this effect. Even if it were true, however, the "Hardy" could have waited at Fort Bragg for fuel oil to be sent up there, or she could have at least sought other assistance for her tow. The sole reason she did not do these things was that it seemed more important to her to attend *to her own business*. Admitting her right to so decide, it is inevitable that she must bear the consequences, for nothing is better settled than that the duty to fulfil other engagements does not justify the abandonment of a tow. As said by Judge Morrow in *Jacobsen v. Lewis Klondike Expedition Co.*, 112 Fed. 73, 77, cited *infra*:



*“The ‘reasonable care and skill’ required by law in the performance of the towage contract was not diminished or waived by the added undertakings. It was incumbent upon the Noyo to perform all the conditions of her contract with the Evans with the same degree of care and skill as would have been required of her had the towage contract been the only object and purpose of the voyage.”*

On the question of the necessity of having a sufficient supply of fuel on board a towing vessel, the case of *The Undaunted*, 5 Asp. Mar. Cases, N. S., 580, 581, is strongly in point. The court there says:

*“This is an action arising out of a towage contract to tow the ship ‘Undaunted’ from Havre to Cardiff. The tug was not at Havre at the time when the contract was entered into, but in pursuance of the contract she proceeded to Havre, and there took the ‘Undaunted’ in tow on the 26th April, 1884. When off Trevose Head, which is some 70 miles from Cardiff, it was found there were only 15 tons of coal remaining on board the tug. Her master did that which was probably prudent and right under the circumstances. With the approval, so far as I can gather, of the master of the tow, he cast off and went to Swansea to procure a fresh supply of coal. The ‘Undaunted’ in the meantime was put under canvas, and is said to have beat to the northward, but probably she did not materially alter her position before the tug came back on the following day. Arguments have been directed as to the quantity of coal the tug had on board at the time she left Havre, and on the evidence I come to the conclusion that she was not properly or adequately supplied. It is a matter of very great importance that steam-tug owners should not be released from the obligation which is incumbent upon them to provide adequately and properly equipped tugs, because the consequences of having to cast a vessel*

*off in the middle of the towage may be of the very gravest kind.* It may involve not only serious danger to property, but also to life. If a tug were to cast off a ship in a gale of wind and on a lee shore in order to go and procure coal, the consequences would be serious. Therefore I am not disposed to diminish the responsibility of the tug-owners in that respect.

With regard to the circumstances of this case, I have no doubt that the weather was worse than the captain of the tug anticipated before he started on the voyage. I am not prepared to say that it was worse than he had reason to expect, but at the same time I have no doubt that the weather was bad, and that when the tug cast off they had been practically making no way at all. It is said that, assuming the coal on board on starting from Havre to have been inadequate, it is not a matter for which the tugowners are responsible, for by the terms of the card, which is said to have been incorporated in the contract, they are not responsible for the negligent acts of the master. I do not think, however, that that can avail the plaintiffs in this case, because there is an implied undertaking on the part of tugowners to supply an efficient tug, including sufficient equipments *and a proper supply of coal, and if the tug was—as I find it was—deficient in this respect, it is a matter for which the tugowners are liable, notwithstanding the exceptions in the card.*”

We submit that the showing made on this question of fuel oil is a most convincing showing of negligence on the part of the “Hardy”. This is not a case of mere errors of judgment or of the exercise of a sound discretion, but of *positive, active negligence*. Either Captain Michaelson had enough fuel oil on board and abandoned his tow after a brief, futile and ineffective search for her or else his vessel was absolutely unsea-



worthy for a voyage which might well have lasted 72 hours even without a tow, and which was in fact completed in 61. Moreover, the lack of enough fuel oil to take the "*Hardy*" to *San Francisco* is not a proper criterion of her right to desert her tow while near another safe port.

We believe that the foregoing discussion renders the citation of cases unnecessary and we shall only refer to a few. Each towage case depends largely on its own peculiar circumstances and it is not easy to argue from one case to another. The general principle applicable to the subject of abandonment of tows is well stated as follows:

“(2) PERMANENT ABANDONMENT.—A tug does not warrant that she will be able to complete the voyage under all circumstances and hazards, but only that she will use her best endeavors to do so. Where the voyage is abandoned on account of obstacles which the tug does not undertake to overcome, there still remains the obligation to take reasonable care of the tow *and not to leave it until it is in a place of safety*; unless, of course, that becomes impossible or perilous to do, *as where the tow is sinking or past saving or the tug is injured or in great danger.*”

*28 Am. & Eng. Encyc. of Law*, 2 ed., p. 269.

The following statement as to the law of towage by this court in *Jacobsen v. Lewis Klondike Expedition Company*, 112 Fed. 73, 77, is also in point in view of the fact that the "*Hardy*" was carrying lumber and the towage was only subsidiary:

“It is well-settled law that the towing vessel is bound to exercise reasonable care and skill in the performance of the duty assumed, and that



failure therein will create liability for any injury resulting. The Webb, 14 Wall. 406, 414, 20 L. Ed. 774; The Margaret, 94 U. S. 494, 24 L. Ed. 146; The Burlington, 137 U. S. 386, 392, 11 Sup. Ct. 138, 34 L. Ed. 731. Did the Noyo in this case fail to perform such duty? A somewhat different state of facts is presented than in the usual controversy for breach of a towage contract. Ordinarily the sole purpose of the towing vessel is to take her tow safely and expeditiously to the point of destination. But in this case there was an added purpose. In fact, it is perhaps questionable whether the towing of the vessels was not deemed of secondary importance to the main business of transporting passengers and freight as quickly as possible to the port of discharge. The steamer Noyo was not a tug, whose sole business was that of towing. It was a steam schooner, about 100 feet in length, engaged in the transportation of freight and passengers between Seattle, Wash., and St. Michaels, Alaska. At that time the great rush to the Klondike was under way, and vessels of every description were pressed into service for all Alaskan points, the supply being wholly inadequate. River boats were in great demand on the Yukon, and all possible means taken to get such boats to the entrance to the river at St. Michaels. The Noyo, under this stress of circumstances, undertook to tow for more than 2800 miles two boats aggregating three times her own length, loaded with coal and Alaskan supplies, in addition to carrying the load in her own hold. Part of this voyage was necessarily by way of the open sea. Such an undertaking called not only for great power on the part of the towing vessel, but *enlarged the measure of her duty to cover the increased risk of disaster, and to meet the conflicting interests of her various contractual engagements*, namely, the two contracts of towage, and the agreements with respect to her own passengers and cargo. *The 'reasonable care and skill' required by law in the performance of the towage*

*contract was not diminished or waived by the added undertakings. It was incumbent upon the Noyo to perform all the conditions of her contract with the Evans with the same degree of care and skill as would have been required of her had the towage contract been the only purpose and object of the voyage."*

As has been before pointed out, we cannot but believe that the "Hardy" left her tow mainly to carry out her other engagements and, if so, her conduct does not measure up to the standard above laid down. We might also add that if, as was claimed in the lower court, the 'Hardy's' large deckload of lumber made it necessary for her to turn around and proceed north till daylight instead of simply heaving to, this necessity for the protection of her cargo engagements does not excuse her desertion of the barge at that time.

In the case of *Appeal of Cahill*, 124 Fed. 63, 64, the following applicable language is used in regard to the duty of a tug to her tow:

"Even if the circumstances had been sufficient to justify the master of the tug in cutting loose from the dredge in order to take off the men, they did not justify him in deserting her and her scows, and allowing them to be beached without any effort to save them. We are satisfied there was a reasonable chance that they could have been saved if the tug had resumed charge of them. Their owner was entitled to the benefit of the chance, and as he had been deprived of it by the conduct of the tug, in disregard of her duty to use all reasonable efforts for the preservation of her tow, *the tug must respond for the consequences, in the absence of clear proof that her efforts would have been ineffectual.* Upon this branch of the case we fully concur in the opinion of the court be-



low, and do not deem it necessary to express ourselves further.”

The only other case which we care to cite is that of *In re Moran*, 120 Fed. 556. Not only is this case in point on the question of the tug's duty to supply an efficient hawser, and on the proposition that an agreement that the towage shall be at the risk of the tow does not absolve the tug from negligence; but it is also very strongly in point on the question of an improper abandonment of a tow and on the rule, so strongly insisted on by counsel at the trial, as to the discretion of the master of the tug. In that case the tug “A. Moran” was towing a dredge. The hawser parted in the night time on the open ocean when there was a gale of wind, blowing 35 miles an hour, and a very heavy swell. The dredge had considerable water in her, her smokestack had fallen in and her crew abandoned her and went on board the tug for safety. After circling round the dredge for a while the tug considered the situation hopeless and left her. On pages 562 and 563 of the opinion the court thus characterizes this abandonment:

“The Moran's abandonment of the dredge, and departure for, and delay at, Norfolk, are not excusable, and the fault is emphasized by her indolent and insufficient search. The excuses are (1) that the tug was in danger from the storm; (2) that it was useless to stand by the dredge, as she could not be retaken; (3) that the crew had abandoned the dredge. The first plea is obviously untrue. The weather on the night of the abandonment was doubtless boisterous but several tugs anchored their tows in the general neighborhood of the entrance of the bay and kept near them all night, while the



Moran within an hour or two of daybreak, and in the face of no greater danger than brave seamen ordinarily encounter successfully, left the dredge to her fate, and not content, even on a flood tide, within the protecting shelter of the Cape, where the light could be awaited for pursuing and taking up the dredge, did not stop until she had reached the utmost security of Norfolk, 40 miles away, where she renounced practically all effort to reclaim her tow.”

\* \* \* \* \*

“There is no intention to suggest that the crew of the tug were cowardly, for they had faced the night almost to its ending; and it is considered that a sense of personal danger for himself, his men, or tug, did not influence considerably the departure of the Moran’s captain. But surely his leaving his tow, almost on the edge of the morning, when it was floating successfully, and going 40 miles away, and staying away, showed neither good judgment, fidelity to his charge, nor that sturdy and obdurate endeavor to hold onto his tow that the law should demand under the conditions then existing. *If the master of a tug may regard the tow as lost whenever there is a hard storm and his hawsers break, and the men on the tow come off, then Capt. Ellis was right. Such action is far from the cool judgment and dauntless endeavor to discharge his trust that should characterize the master of an American vessel.*”

As regards the claim that the matter rested solely in the master’s judgment, the court said at page 564:

“The plea is made that the master’s judgment is best and should control. That is a rule to be honored in a proper case (*The Hercules* (D. C.), 75 Fed. 274; *The E. Luckenbach*, 51 C. C. A. 589, 113 Fed. 1017 affirming (D. C.) 109 Fed. 487; *The J. P. Donaldson* (D. C.), 19 Fed. 264, 266; *The Packer* (C. C.), 28 Fed. 156), but should not relieve

offending tugs. When a tug deserts her tow, there ought to be a good reason assigned for it. In the present instance, the master went away without a justifiable motive, without the influence of a warranted apprehension, with his tow afloat and not seriously damaged. He went because he lost hope, and he stayed away for the same reason; yet the evidence does not offer any substantial ground for his hopelessness. Neither danger, nor necessity, nor advantage, nor convenience, constrained the tug to go to Norfolk, or to remain there 17 hours; she obtained nothing but unneeded coal, and, if she needed a hawser, did not even inquire for one, although they were sold there. But whatever she needed she could have obtained in a brief time, and thereupon gone in pursuit. If the shelter of the bay was desirable, and the master was justified in seeking it, how does that excuse him? *To excuse a tug for leaving and remaining away from her tow, there should be proof that the tow was sinking, or past saving, or that the tug was so injured or in such danger that it could not stay or return, or similar condition.* Several cases are cited, which do not absolve the Moran, for, where they favor the tower, either the tug was injured or in danger, or the tow was beyond conservation, and departure was justified and return excused."

This language is peculiarly applicable to counsel's contention in the case at bar.

We finally wish to cite from this case a quoted passage from *MacLachlin on Merchant Shipping*. This appears on pages 566 and 567 of the opinion and reads as follows:

"But there is no implied warranty on the part of the tug to bring the tow to the point of destination under all circumstances and at all hazards. The Minnehaha, 30 Law J. Adm. 211. She engages to use her best endeavors for that purpose; but



she is relieved from her obligation if she be prevented by vis major, or by accidents not contemplated, which render performance of her contract impossible. *The Minnehaha*, 30 Law J. Adm. 211.

“She is not relieved, however, from her obligation because unforeseen difficulties occur in the completion of her task—because the performance of her task is interrupted or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship’s hawser. But if, in the discharge of her task, by reason of the sudden violence of winds or waves, or other accidents beyond the control of and without default in the tug, the tow is placed in danger, and the tug incurs risks and performs duties which were not within the scope of her original engagement, she is entitled, on proof of this, if the ship be saved, to claim as a salvor instead of being restricted to the sum stipulated for mere towage. *The Minnehaha*, supra; *The Pericles*, Brown & L. 60. *The Charles Adolphe*, Swab. 153; *The Albion*, Lush. 282; *The Rober Dixon*, 42 Law T. (N. S.) 344. Such a remuneration under the supposed circumstances becomes her right; *but in such circumstances it is not optional with her whether she will render the services—she is bound to do so.* This is implied in her original contract, from which she is not relieved except by circumstances of difficulty that render the performance of it impossible. *The Saratoga*, Lush. 318; *The Minnehaha*, supra; *The White Star*, L. R. 1 Adm. & Ecc. 66.”

We submit that this case is very strongly in point and shows as clearly as any case could that the abandonment of the barge by the “Hardy” in this case was absolutely unjustifiable. Captain Michaelson’s conduct hardly measures up to the standard required of the master of an American vessel, and we submit that if it be held that tows can be deserted with such absolute



impunity as this barge was, it will be a reproach to the law governing such situations.

Counsel will doubtless rely, as he did in the lower court, on cases like *The Czarina*, 112 Fed. 541. In that case the Czarina left a raft, which, the court said, it would have been dangerous to pick up, and proceeded to the nearest port, Point Arena. The point is, however, that in that case, as soon as the weather moderated, the master went out again and spent *three days* in the fog, in seas which were still rough, looking for the raft, which he was unable to find on account of the fog. No inference can possibly be drawn from this case which will justify the "Hardy's" abandonment of the barge in the case at bar. Indeed, had she done one-half as much as the Czarina did, there is no question whatever but that the barge would have been recovered.

---

## VI.

### CONCLUSION.

We submit in conclusion that the "Hardy" was negligent both in failing to relight the light on the barge and in failing to keep a sufficient lookout. We further submit that she was grossly negligent in abandoning the barge as she did, and that this court should not lend its approval to a principle of towage law which permits the absolute desertion of a tow under such flagrant circumstances as those disclosed in the case at bar. We therefore submit that the decree should be reversed with costs to appellants and that the cause

should be referred to a Commissioner to ascertain the damages sustained by libelants.

Dated, San Francisco,  
October 20, 1915.

E. B. McCLANAHAN,

S. H. DERBY,

*Proctors for Appellants.*

United States  
Circuit Court of Appeals

For the Ninth Circuit.

---

K. V. KRUSE and R. BANKS, Copartners Doing  
Business Under the Firm Name of "KRUSE  
& BANKS SHIPBUILDING COMPANY," a  
Corporation, on Behalf of Themselves and  
Their Underwriters,

Appellants,

vs.

M. J. SAVAGE, EDW. J. MORSER, JAMES H.  
HARDY, INC., JAMES H. HARDY, HANS  
MICHELSON, Mrs. F. RULFS and Dr.  
ALEXANDER WARNER, Claimants of the  
American Steamer "HARDY," Her Tackle,  
Apparel and Furniture,

Appellees.

---

Apostles.

---

Upon Appeal from the United States District Court for  
the Northern District of California,  
First Division.

Filed

JUL 23 1915





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

K. V. KRUSE and R. BANKS, Copartners Doing  
Business Under the Firm Name of "KRUSE  
& BANKS SHIPBUILDING COMPANY," a  
Corporation, on Behalf of Themselves and  
Their Underwriters,

Appellants,

vs.

M. J. SAVAGE, EDW. J. MORSER, JAMES H.  
HARDY, INC., JAMES H. HARDY, HANS  
MICHELSON, Mrs. F. RULFS and Dr.  
ALEXANDER WARNER, Claimants of the  
American Steamer "HARDY," Her Tackle,  
Apparel and Furniture,

Appellees.

---

**Apostles.**

---

Upon Appeal from the United States District Court for  
the Northern District of California,  
First Division.

---





INDEX TO THE PRINTED TRANSCRIPT OF  
RECORD.

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Answers to Interrogatories Propounded by Libelants.....	20
Answers to Interrogatories Propounded by Libelants, Answer to Libel, and.....	16
Answer to Libel and Answers to Interrogatories Propounded by Libelants.....	16
Assignment of Errors.....	174
Certificate of U. S. Commissioner to Deposition of Richard C. Brennan.....	61
Certificate of Clerk U. S. District Court to Apostles on Appeal.....	178
Conclusions and Order That Decree be Entered in Favor of Respondent.....	170
Decree, Final.....	172
DEPOSITIONS ON BEHALF OF LIBEL- ANTS:	
BANKS, ROBERT .....	67
Cross-examination .....	73
Redirect Examination.....	80
Recalled.....	163

Index.	Page
DEPOSITIONS ON BEHALF OF LIBEL- ANTS—Continued:	
BRENNAN, RICHARD C. ....	50
Cross-examination ....	53
Redirect Examination ....	59
Recross-examination ....	60
BRITT, O. P. ....	24
Cross-examination ....	28
Redirect Examination ....	30
Recross-examination ....	30
CHRISTENSEN, L. H. ....	31
Cross-examination ....	32
Redirect Examination ....	35
DAVENPORT, J. E. ....	86
Cross-examination ....	91
DUNSON, J. ....	36
KRUSE, K. V. ....	38
Cross-examination ....	40
MICHAELSEN, HANS ....	103
Cross-examination ....	116
Redirect Examination ....	141
PETERSON, HENRY C. ....	65
Cross-examination ....	67
PILLSBURY, A. F. ....	92
Cross-examination ....	97
Redirect Examination ....	102
Recross-examination ....	102
ROSENTHAL, LOUIS ....	81
Cross-examination ....	85
Redirect Examination ....	86

## Index.

Page

## DEPOSITIONS ON BEHALF OF LIBELLE:

FALKENSTEIN, L. F. ....	42
Cross-examination ....	44
Redirect Examination ....	45
SIMPSON, EDGAR M. ....	46
Cross-examination ....	47
Redirect Examination. ....	48
Depositions Taken Before U. S. Commissioner, Krull. ....	49
Designation of Parts of Record to be Printed, Appellants' ....	1
Final Decree. ....	172
Interrogatories, Libel in Rem and. ....	9
Interrogatories Propounded to the Libelee and Claimant Herein. ....	13
Libel in Rem. ....	9
Minutes, March 5, 1915, as to Filing of Opinion etc. ....	170
Minutes of Hearing—June 2, 1914. ....	168
Minutes of Proclamation. ....	16
Notice of Appeal. ....	173
Notice of Filing Apostles on Appeal and Appel- lants' Designation of Parts of Record to be Printed. ....	1
Order Directing That Original Exhibits be Sent to Appellate Court, etc. ....	177
Order That Decree be Entered in Favor of Re- spondent. ....	170
Order That Decree be Entered in Favor of Re- spondent, Conclusions and. ....	170
Praecipe for Transcript on Appeal. ....	4



Index.	Page
Proceedings Had June 2, 1914.....	63
Proclamation, Minutes of.....	16
Recital as to Libelant's Exhibit No. 1.....	49
Statement of Clerk U. S. District Court.....	5
Stipulation and Order for Sending up Original Exhibits.....	177
Stipulation and Order Waiving Printing of Original Exhibits.....	3
Stipulation as to Testimony of Arthur Self.....	22
Testimony Taken in Open Court.....	63
TESTIMONY ON BEHALF OF RESPOND- ENT:	
HULTGREEN, A. ....	142
Cross-examination ....	148
KNUDSON, K. ....	154
Cross-examination ....	157
PREEGEN, HENRY.....	159
SANNE, RUDOLPH .....	161
Cross-examination ....	162

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. 2618.

K. V. KRUSE and R. BANKS, Copartners, etc.,  
Appellants,

vs.

M. J. SAVAGE, EDW. J. MORSER et al.,  
Appellees.

**Notice of Filing Apostles on Appeal and  
Appellants' Designation of Parts of Record to  
be Printed.**

To the Appellees in the Above-entitled Cause and W.  
S. Andrews, Their Proctor:

Please take notice that Apostles on Appeal in the  
above-entitled cause were filed in the above-entitled  
court on the 29th day of June, 1915.

You are further notified that appellants intend  
to rely upon all of the assignments of error in said  
record and consider all of said record necessary  
for the consideration of their said assignments of  
error with the exception of the following pages of  
the record which appellants did not consider neces-  
sary to be printed in said record and desire to have  
omitted from said record as printed:

1. Page 15. Claim.
2. Pages 27 and 28. Stipulation in regard to  
depositions of O. P. Britt et al.
3. Page 29. Further stipulation in regard to  
depositions of O. P. Britt et al.

4. Pages 55 and 56. Certificate to depositions of O. P. Britt et al.

5. Page 57. Index to depositions of O. P. Britt et al.

6. Pages 168–170, inclusive. Bond on Appeal.

7. Page 171. Notice of filing Bond on Appeal.

8. Page 174. Substitution of Attorneys.

9. All original exhibits sent up by the lower court, for the reason that said exhibits by stipulation between parties may be considered as original exhibits without being printed.

10. Omit also extended title of court and cause in all cases except on the first page and in the original libel and insert in place thereof the words “Title of Court and Cause.”

Dated July 2, 1915.

E. B. McCLANAHAN,

S. H. DERBY,

Proctors for Appellants.

[Endorsed]: No. 2618. In the United States Circuit Court of Appeals for the Ninth Circuit. K. V. Kruse and R. Banks, copartners, etc., Appellants, vs. M. J. Savage, Edw. J. Morser et al., Appellees. Notice of Filing Apostles on Appeal and Appellants' Designation of Parts of Record to be Printed. Filed Jul. 3, 1915. F. D. Monckton, Clerk.

Receipt of copy of the within Notice and Designation is hereby admitted this 2 day of July, 1915.

W. S. ANDREWS,

Proctor for Appellees.



[Title of Court and Cause.]

**Stipulation and Order Waiving Printing of  
Original Exhibits.**

Whereas, the four exhibits sent up with the record in the above cause as original exhibits can best be considered by the Court in their original form; and

Whereas, it would be expensive to print said original exhibits; now, therefore,

IT IS HEREBY STIPULATED that said exhibits need not be printed, but may be considered by the Court as original exhibits, even though not printed.

Dated July 1st, 1915.

E. B. McCLANAHAN,

S. H. DERBY,

Proctors for Appellants.

W. S. ANDREWS,

Proctor for Appellees.

IT IS SO ORDERED.

WM. W. MORROW,

United States Circuit Judge.

[Indorsed]: No. 2618. United States Circuit Court of Appeals for the Ninth Circuit. K. V. Kruse and R. Banks, Copartners etc., Appellants, vs. M. J. Savage et al., Appellees. Stipulation and Order Waiving Printing of Original Exhibits and Order. Filed July 7, 1915. F. D. Monckton, Clerk.

[Title of U. S. District Court and Cause.]

**Praeceptum for Transcript on Appeal.**

To the Clerk of the above-entitled Court:

Please prepare transcript of record in this cause on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and include in said transcript the following:

1. Statement required by Admiralty Rule 4, Section 1, Subdivision 1, of said Circuit Court of Appeals.

2. All the pleadings, together with the exhibits annexed thereto, the same being:

(a) Libel and Interrogatories.

(b) Claim.

(c) Answer and answer to interrogatories.

3. All testimony and depositions taken in said cause including stipulation filed May 28, 1914, as to testimony of A. Self.

4. Court minutes of proceedings and orders in the above cause.

5. The opinion filed March 5, 1915.

6. Substitution of attorneys.

7. The final decree. [1\*]

8. The original exhibits (4) introduced in evidence in the above cause, together with stipulation of counsel and order of Court for their transmission to Circuit Court of Appeals.

9. Notice of appeal, bond on appeal, notice of

---

\*Page-number appearing at foot of page of Original Certified Apostles.

filing bond on appeal and assignment of errors.

10. This praecipe.

Dated June 15th, 1915.

McCLANAHAN & DERBY,

Proctors for Appellants.

[Endorsed]: Filed Jun. 15, 1915. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [2]

---

[Title of Court and Cause.]

**Statement of Clerk U. S. District Court.**

**PARTIES.**

Libelants: K. V. Kruse and R. Banks, copartners  
doing business under the firm name  
of Kruse & Banks Shipbuilding  
Company, on behalf of themselves  
and their underwriters.

Libellee: The American steamer "Hardy," her  
tackle, apparel and furniture.

Claimants: M. J. Savage, Edw. J. Morser, James  
H. Hardy, a Corp., James H. Hardy,  
Hans Michelsen, Mrs. F. Rulfs and  
Dr. Alexander Warner. [3]

**PROCTORS.**

For the Libellant: Messrs. McClanahan & Derby,  
San Francisco, Cal.

For Libellee and  
Claimants: Messrs. Nathan H. Frank and  
Irving H. Frank, San Fran-  
cisco, Cal., Original Attorneys.  
W. S. Andrews, Esquire, San  
Francisco, Cal., Substituted  
Attorney.



## PROCEEDINGS.

1913.

October 25. Filed verified Libel in Rem, for damages in the sum of \$5,000.00, and Interrogatories propounded to Libelee and Claimant.

Issued Monition for attachment of the steamer "Hardy," which said monition was, afterwards, on the 15th day of November, 1913, returned and filed with the following Return of the United States Marshal endorsed thereon: "I hereby certify and return that I received the within Writ at San Francisco on October 25, 1913, and hereby return the same without service this 15th day of November, 1913.

C. T. ELLIOTT,

United States Marshal.

By Geo. H. Burnham,

Chief Office Deputy.

San Francisco, Cal., Nov. 15/13." [4]

Filed Claim of M. J. Savage, Edw. J. Morser, James H. Hardy, a corp., James H. Hardy, Hans Michelsen, Mrs. F. Rulfs and Dr. Alexander Warner.

Filed Stipulation (bond) for release of American steamer "Hardy," in

the sum of \$6,000.00, with Massachusetts Bonding and Insurance Company, as Surety.

1914.

January 27. Filed Answer to Libel and also Answers to Interrogatories propounded by Libelant.

May 28. Filed Stipulation as to the Testimony of Libelant's witness, Arthur Self.

Filed Depositions of O. P. Britt, L. H. Christensen, J. Dunson and K. V. Kruse, for the Libelant, and L. F. Falkenstein and Edgar M. Simpson, for the Libelee and Claimants, taken before Annie Smith, Notary Public at North Bend, Oregon.

June 2. Filed Deposition of Richard C. Brennan, taken on behalf of the Libelant before Francis Krull, United States Commissioner.

This cause this day came on for hearing in the District Court of the United States, for the Northern District of California, at the City and County of San Francisco, before the Honorable M. T. Dooling, Judge, and after hearing duly had, was submitted to the Court for decision.

[5]

9. Filed one volume of testimony taken in open Court.

1915.

March      5. Filed Opinion and Order to Enter Decree in favor of Respondent.

June        7. Filed Final Decree.

15. Filed Notice of Appeal.

22. Filed Assignment of Errors.

Filed Bond on Appeal in the aggregate sum of \$500.00, with Louis Rosenthal and George Steel, as Sureties.

Filed Stipulation and Order as to the transmitting of original exhibits on appeal.

28. Filed Substitution of Attorney. [6]

---

*In the District Court of the United States in and for the Northern District of California, First Division.*

K. V. KRUSE and R. BANKS, Copartners Doing Business Under the Firm Name of KRUSE & BANKS SHIPBUILDING COMPANY, on Behalf of Themselves and Their Underwriters,

Libelants,

vs.

The American Steamer "HARDY," Her Tackle, Apparel and Furniture,

Libellee.



**Libel in Rem.**

**(AND INTERROGATORIES.)**

To the Honorable MAURICE T. DOOLING, Judge  
of the District Court of the United States in and  
for the Northern District of California:

The libel of K. V. Kruse and R. Banks, copartners  
doing business under the firm name of Kruse &  
Banks Shipbuilding Company, on behalf of them-  
selves and their underwriters, against the American  
steamer "Hardy," her tackle, apparel and furniture,  
and against all persons intervening for their interest  
therein in a cause of towage, civil and maritime, al-  
leges as follows:

**I.**

That libelants at all times mentioned in this libel  
were and now are copartners doing business under  
the firm name of Kruse and Banks Shipbuilding  
Company at the City of North Bend on Coos Bay in  
the State of Oregon. [7]

**II.**

That late in the month of August, 1913, libelants  
were, ever since have been and now are the owners  
of a wooden barge 86 feet long and 36 feet wide,  
which had just been built, and, desiring to send said  
barge to the port of San Francisco for sale there,  
made a verbal contract with the master of the afore-  
said steamer "Hardy," whereby said steamer was to  
tow said barge from said Coos Bay to said San Fran-  
cisco for the sum of \$200.

**III.**

That in pursuance of said contract and on the 5th

day of September, 1913, said steamer "Hardy" took said barge in tow, supplying the tow rope for said purpose, and proceeded on her voyage towards said San Francisco, said barge being at said time staunch, strong and seaworthy and supplied with a proper light and all necessary equipment, and that said barge was at said time placed in the sole charge of said steamer "Hardy," no one being on board of said barge.

#### IV.

That by reason of the premises and under the aforesaid contract it became incumbent on said steamer "Hardy" to supply the proper ropes for the towage of said barge, and to take all reasonable and proper steps and precautions and use reasonable care to tow said barge in safety to the port of San Francisco.

#### V.

That on the course of said voyage, and at a point and a time which libelants are unable to specify with accuracy, the towing hawser by which said steamer "Hardy" was towing said barge parted, and said barge, with no one on board and being powerless to help herself, drifted ashore some time later near Caspar on the California coast, and it became necessary for [8] libelants to employ and pay for assistance to secure said barge and pull her off the rocks on which she had been driven and tow her to the port of San Francisco for repairs, said barge having been greatly damaged by reason of said stranding and having also greatly depreciated in value on that



account; and that said barge was thereafter duly repaired in said San Francisco, and that libelants have suffered damages in the premises in the sum of \$5,000.

## VI.

That said damages were caused entirely by the negligence of said steamer "Hardy," its master, officers and crew, and without any negligence on the part of said barge or the libelants; that libelants are at present unable to specify with accuracy all the particulars wherein said steamer "Hardy," her master, officers and crew were negligent, but are informed and believe and on such information and belief allege that they were negligent in providing a defective rope for towing said barge, in not discovering that said barge was adrift until a long time after the breaking of said rope, in not making a diligent, sufficient or long enough search for said barge, and in allowing the light on said barge to go out and not again lighting the same, and that the damages aforesaid were due to said acts of negligence and to each of them.

## VII.

That said steamer "Hardy" is an American vessel of 429 gross tonnage and 289 net tonnage, and is now within the port of San Francisco in the Northern District of California. [9]

## VIII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

WHEREFORE, libelants pray that process of at-



tachment in due form according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the said steamer "Hardy," her tackle, apparel and furniture, and that all persons having or pretending to have any right, title or interest therein may be cited to appear and answer all and singular the matters propounded herein, and that this Honorable Court would be pleased to pronounce the damages aforesaid with interest and costs, that said steamer, her tackle, apparel and furniture may be condemned and sold to pay the same, and that libelants may have such other and further relief as shall be meet in the premises.

Dated: October 25th, 1913.

McCLANAHAN & DERBY,  
Proctors for Libelants. [10]

State of California,

City and County of San Francisco,—ss.

R. Banks, being first duly sworn, on oath deposes and says: That he is one of the libelants herein.

That he has read the foregoing libel and knows the contents thereof; that the matters therein set forth are true except as to such as are stated upon information and belief, and as to these he believes them to be true.

That he makes this verification on behalf of both of the libelants herein, having due authority so to do.

R. BANKS.

Subscribed and sworn to before me this 25 day of October, 1913.

[Seal]

CHARLES EDELMAN,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My commission expires April 9th, 1914. [11]

**Interrogatories Propounded to the Libelee and  
Claimant Herein.**

Interrogatory 1. Did the steamer "Hardy" leave Coos Bay for San Francisco on or about the 5th day of September, 1913, with a barge belonging to the libelants herein in tow?

Interrogatory 2. Who supplied the hawser used in towing said barge and how old was said hawser?

Interrogatory 3. On what day, at what hour and at what place did said barge go adrift?

Interrogatory 4. What efforts were made by the "Hardy" to locate said barge after she went adrift, and when were such efforts discontinued?

Interrogatory 5. Who was in charge of said "Hardy" when said barge went adrift, and how many men were on deck with him and in what positions?

Interrogatory 6. At what hour did the "Hardy" leave Coos Bay and on what day and at what hour did she arrive in San Francisco?

Interrogatory 7. State in detail the distance covered by the "Hardy" on her whole voyage and on each day thereof, and how many knots per hour she made each day.

Interrogatory 8. How much fuel does the "Hardy" burn on an average day's run?



Interrogatory 9. How much fuel was on board the "Hardy" at 11 A. M. on September 7th, 1913?

Interrogatory 10. Did the master of the "Hardy" make the following report after reaching San Francisco: [12]

"San Francisco, Cal., Sept. 10, 1913.

Collector of Customs,

San Francisco, California.

Dear Sir:—

I have to report:—

The S. S. 'Hardy' left Coos Bay, Oregon, on Sept. 5, 1913, about 4 P. M., bound to San Francisco with a red painted flush deck barge in tow, with no person or persons on board of barge.

When about 25 miles South Easterly of Point Gorda, distance off shore about 14 miles the tow-line parted—time 0 h. 30 m. A. M., September 7, 1913.

I immediately hove my steamer too with her head North Westerly until daylight. Daylight weather foggy.

I steamed about searching for barge, but was unable to find said barge.

8 A. M., same date, fog lifted, and I continued to search for the barge until 11 o'clock A. M., same date, and not having sufficient fuel to further delay I then proceeded on my voyage to San Francisco.

At about 6 P. M. (same date) Sunday, Sept. 7, 1913, I spoke the S. S. 'BEAVER' bound North, and informed him of loss of my tow, and asked him to send a Wireless to San Francisco.

I arrived in San Francisco, Monday, September 8, 1913, and reported to the U. S. Hydrographic Office



by telephone, and also to the owner of the barge, Mr. Davenport.

No damage to my vessel.

Respectfully submitted,

(Sg.) H. MICHELSEN,

Master S. S. 'HARDY.' "

Interrogatory 11. Is said report correct in all respects and, if not, wherein is the same incorrect?

Interrogatory 12. Did the light on the barge go out on the course of the voyage and, if so, when did it go out?

Interrogatory 13. Was the light on said barge lit again at any time thereafter?

Interrogatory 14. When the master of the "Hardy" spoke the S. S. "Beaver" on September 7th, 1913, as mentioned in the report contained in Interrogatory 10, did he not tell said S. S. "Beaver" that the barge therein mentioned had no light on her and was a menace to navigation or words to that effect? [13]

[Endorsed]: Filed Oct. 25, 1913. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [14]

---

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 11th day of November, in the year of our Lord, one thousand, nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#15,484.

K. V. KRUSE et al.,

vs.

Am. Str. "HARDY," etc.

**Minutes of Proclamation.**

On motion of G. Bell, Esqr., proclamation was duly made for all persons having anything to say to appear and answer the libel herein and on motion of I. Frank, Esqr., claimant was granted ten days to plead to said libel. [16]

---

[Title of Court and Cause.]

**Answer to Libel and Answers to Interrogatories  
Propounded by Libelants.**

To the Honorable the District Court of the United States, in and for the Northern District of California, Division One.

The answer of M. J. Savage, Edw. J. Morser, James H. Hardy, Inc., James H. Hardy, Hans Michelson, Mrs. F. Rulfs and Dr. Alexander Warner, claimants herein, to the libel of K. V. Kruse and R. Banks, copartners doing business under the firm name of Kruse & Banks Shipbuilding Company, on behalf of themselves and their Underwriters, against the American steamer "Hardy," her tackle, apparel and furniture, and against all persons intervening for their interests therein, in a cause of towage, civil and maritime, alleges as follows:

**I.**

Answering unto paragraph I of the said libel,

claimants are ignorant of the matters and things therein set forth, so that they [17] can neither admit nor deny the same, wherefore they call for proof thereof.

## II.

Answering unto paragraph II of sail libel, claimants admit that the master of the steamship "Hardy" entered into a verbal contract with R. Banks for the towage of a certain barge at some time during the month of August, 1913, but allege that in and by said contract it was agreed that the said towage was to be done at the sole risk of the owners of said barge. They further allege that no part of said \$200.00 agreed to be paid for said service has ever been paid or tendered to said claimants, or to the master or owners of said vessel.

As to the allegations that libelants were, ever since have been, and now are, the owners of the wooden barge mentioned in the libel on file herein, and that said libelants desired to send said barge to San Francisco, for sale there, claimants are ignorant of the matters so set forth, so that they can neither admit nor deny the same, wherefore, they call for proof thereof.

## III.

Claimants deny that the said steamer "Hardy" furnished the tow rope for the purpose of towing the said barge, and on the contrary allege that it was in and by the contract of towage provided that the owners of said barge should provide the tow-line which was in fact provided by the said owners and fastened to the said barge under the supervision of



libelants. Claimants further deny that said barge was at any of the times mentioned in the libel, staunch, strong or seaworthy; deny that said barge was supplied with a proper light and all necessary equipment.

#### IV.

Deny that by reason of the premises and under the contract for towage of the said barge, or by any reason or contract whatsoever, [18] it became incumbent on the said steamer "Hardy" to supply the proper ropes for the towage of said barge, or any rope at all for said towage; and in this regard claimants allege that under the aforesaid contract for towage, it was incumbent upon the owners of said barge to supply the necessary ropes for said towage, and that the ropes used for said towage were in fact supplied by the said owners.

#### V.

As to the allegations in paragraph V of said libel, that said barge drifted ashore some time later near Caspar on the California coast, and that it became necessary for libelants to employ and pay for assistance to secure said barge and pull her off the rocks on which she had been driven and tow her to the port of San Francisco for repairs, or that said barge was greatly damaged, or damaged at all, or that it has greatly depreciated in value on that account, claimants are ignorant, so that they can neither admit nor deny the same, wherefore, they call for proof thereof.

Claimants deny that libelants have offered damage in the premises in the sum of Five Thousand (5,000) Dollars, or in any sum whatsoever.

## VI.

Claimants further deny that the damages as in paragraph VI of the libel alleged were caused entirely, or at all, by the negligence of the steamer "Hardy," its master, officers and crew, or either of them, and deny that the same was without negligence on the part of the said barge, or the libelants.

Claimants deny that they provided a defective rope, or any rope, for the towage service to said barge, and further allege that the steamer "Hardy," her master, officers and crew, used every effort and proper diligence to pick up the said barge after she [19] broke adrift; deny that said master, officers and crew were negligent in not discovering that said barge had broken adrift, and in this respect allege that the said steamship "Hardy" had proper lookouts stationed for the purpose of observing the tow, and the said lookouts used all diligence in respect thereto. They further deny that they were negligent in allowing the lights on the barge to go out, or in not again lighting them, but in this regard they allege that said lights were furnished and placed on board said barge by libelants, and that when said lights went out it was, by reason of the condition of the sea, impossible to board said barge for the purpose of re-lighting them.

## VII.

Claimants deny that all or singular the premises in said libel set forth are true, but admit the jurisdiction of this Honorable Court.



WHEREFORE, claimants pray that said libel may be dismissed and for their costs herein.

NATHAN H. FRANK,  
IRVING H. FRANK,  
Pretors for Libelees. [20]

City and County of San Francisco,  
Northern District of California,—ss.

James H. Hardy, being duly sworn, deposes and says: I am one of the claimants in the above-entitled cause; I have read the foregoing Answer to Libel, and know the contents thereof; that the same is true of my own knowledge, except as to the matters which are therein stated upon information and belief, and that as to those matters I believe it to be true.

JAMES H. HARDY.

Subscribed and sworn to before me this 26th day of January, 1914.

[Seal] MATTHEW BRADY,  
Notary Public in and for the City and County of San Francisco, State of California. [21]

**Answers to Interrogatories Propounded by  
Libelants.**

Answer to Interrogatory 1. The steamer "Hardy" left Coos Bay for San Francisco on the 5th day of September, 1913, with a barge in tow. As to whether it was the property of libelants, claimants are uninformed. The barge was taken in tow at the request of Messrs. Kruse and Banks.

Answer to Interrogatory 2. Mr. Banks supplied the hawser, instructing the master of the vessel to obtain the same from Edgar Simpson. Do not know



how old the hawser was, but it was apparently a good one.

Answer to Interrogatory 3. The barge was first discovered adrift at 40 minutes past 12 on the morning of September 7, 1913, about 25 miles southeast of Point Gorda, 14 miles off shore.

Answer to Interrogatory 4. The barge was reported adrift; the vessel was hove to, the engines working dead slow, and efforts were begun to locate the barge. The efforts were continued from 12:40 A. M. until about 11:15 A. M., in all about 11 hours, when the vessel proceeded to San Francisco. The master also notified the "Beaver" of the loss of the barge, and requested them to keep a lookout for her.

Answer to Interrogatory 5. The mate, Holgren, was on the bridge at the time the barge went adrift; there was a man on the forecastle head as lookout, the quartermaster on the bridge at the wheel with the first officer and a man at the stern as lookout for the purpose of keeping watch on the barge. [22]

Answer to Interrogatory 6. The "Hardy" left Coos Bay on Friday, September 5th, 1913, at 5 P. M., and arrives alongside the wharf at San Francisco at 6 A. M. September 8, 1913.

Answer to Interrogatory 7. September 5th the "Hardy" covered 38 miles; September 6th, 179 miles; September 7th, from 12 midnight to 11:15 A. M., 48 miles, searching for the barge from 11:15 A. M. to 12 midnight, 106 miles. The vessel was making between 6 and 7 knots an hour with barge in tow, and without barge, about 9 knots.

Answer to Interrogatory 8. The vessel burns

about 42 barrels of oil on an average day's run of 24 hours in smooth weather.

Answer to Interrogatory 9. We cannot say.

Answer to Interrogatory 10. Yes.

Answer to Interrogatory 11. It is correct.

Answer to Interrogatory 12. Light on the barge went out about 6:15 P. M. Friday, September 5th.

Answer to Interrogatory 13. No; it was not relit; the sea was too heavy to permit approach to the barge.

Answer to Interrogatory 14. The master of the steamship "Hardy" did not tell the steamer "Beaver" that the barge was a menace to navigation, or words to that effect.

NATHAN H. FRANK,

IRVING H. FRANK,

Proctors for Claimants. [23]

Receipt of a copy of the within Answer and Answer to Interrogatories is hereby admitted this 26th day of January, 1914.

McCLANAHAN & DERBY,

Proctors for Libelants.

[Endorsed]: Filed Jan. 27, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [24]

---

[Title of Court and Cause.]

**Stipulation as to Testimony of Arthur Self.**

It is hereby stipulated and agreed that Captain Arthur Self of the steamer "George W. Fenwick," now plying between San Pedro, California, and Astoria, Oregon, would testify to the following facts if



called as a witness by libelants in the above cause:

That in September, 1913, he was master of the steam schooner "Iaqua"; that on September 6th, 1913, he left the shipyard of Kruse & Banks at Coos Bay in said "Iaqua" at 9 A. M. bound for San Francisco, and arrived at San Francisco at 5:45 A. M. on September 8th, 1913; that during the voyage the weather was comparatively calm, with a smooth sea throughout.

It is further stipulated that said testimony may be used by libelants with the same force and effect as if said witness were personally present and testifying in the above cause (without taking the deposition of said witness), subject to all objections as to the competency, relevancy and materiality thereof.

Dated: May 27th, 1914.

McCLANAHAN & DERBY,

Proctors for Libelants.

NATHAN H. FRANK,

IRVING H. FRANK,

Proctors for Libelee. [25]

[Endorsed]: Filed May 28, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [26]

---

[Title of Court and Cause.]

**Depositions of O. P. Britt et al.**

(DEPOSITIONS TAKEN BEFORE ANNIE SMITH, NOTARY PUBLIC.)

BE IT REMEMBERED that on the 16th day of May, 1914, pursuant to the stipulation of counsel hereunto annexed, at the offices of John G. Mullen,



Rooms 5-7 Bank of Oregon Building, North Bend, Oregon, personally appeared before me, Annie Smith, a Notary Public for the State of Oregon, duly authorized to take depositions, affidavits, etc., and the Commissioner agreed upon by counsel. O. P. Britt, L. H. Christensen, J. Dunson and K. V. Kruse, witnesses produced on behalf of libelants, and L. F. Falkenstein and Edgar M. Simpson, witnesses produced on behalf of the claimants herein; John G. Mullen appeared as counsel for libelants and C. R. Peck appeared as counsel for libelee and claimants, and the said witnesses having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid did thereupon depose and say as is hereinafter set forth: [30]

**[Deposition of O. P. Britt, for Libelant.]**

O. P. BRITT, called for libelant, sworn.

Direct Examination by Mr. MULLEN.

Q. State your name, age, residence and occupation.

A. O. P. Britt, forty-one years old, keeper of the Coos Bay Life Saving Station, residence at Empire, Oregon, or close by.

Q. How long have you held the position as keeper of the Coos Bay Life Saving Station?

A. Very near four years. It will be four years this August.

Q. Were you keeper of the Life Saving Station on the 5th and 6th days of September, 1913?

A. Yes.

Q. Captain, who keeps the records as shown by

(Deposition of O. P. Britt.)

your Journal U. S. Life Saving Station for the year 1913?      A. I do.

Q. You are the keeper—just explain the system which you use to get the weather reports, condition of the surf, bar, etc.

A. This is all taken from the men who are on watch. They are on watch four hours each. The conditions of the surf, the direction of the wind, the force of the wind and condition of the weather, thermometer and barometer are taken four times a day. We have slates—regular log slate in the station, and when the man comes off watch he puts all this down for his watch and the next morning I take it off and transfer it to this book (Journal U. S. Life Sav. Station for 1913). It is a true copy of the watchman's report that is on watch during that time. At the end of the week I take a transcript for the week and that goes to headquarter's office to the district superintendent at Washington and is kept on file. This is all I have to go by. I don't know anything about it, particularly what the weather conditions are during the night. [31]

Q. I will show you Libelant's Exhibit No. 1 and ask you whether or not this is a true copy as shown by your journal for the 5th and 6th days of September, 1913?

A. Yes, as near as I can tell it is an exact copy.

Q. Have you compared the two of them?

A. It is an exact copy with the exception of things relating to the station.

Q. That is it is an exact copy so far as the surf,



(Deposition of O. P. Britt.)

barometer, thermometer and velocity of the wind are concerned?

A. It is an exact copy of the weather conditions and *conditions surf* as indicated here.

The writing just referred to and identified by the witness marked Libelant's Exhibit No. 1 was then offered in evidence.

Mr. PECK.—No objection is made to the fact that the exhibit as offered is a copy rather than the original, for counsel has examined the exhibit as offered, with the original books of record now before the referee, and counsel is satisfied that the same is a true and correct copy, but libelees object to the same as being incompetent, irrelevant and immaterial and not the best evidence, for the reason that the original record was not made by the persons making the investigation and taking the readings but was made by the witness from data furnished to him by third parties, and for the further reason that the same is irrelevant and incompetent to prove in any manner the condition of the weather or conditions of the sea at the point where the barge broke loose from the steamer "Hardy" on the night of September 7th, 1913.

Q. Captain Britt, are the original entries, made by the men who report to you, kept for record?

A. In which way do you mean?

Q. The documents or whatever you take the entries from that you make here, are those saved? [32]

A. No, as soon as I take this off the slate it is wiped



(Deposition of O. P. Britt.)

out. As soon as I take the records off the slate they are all destroyed.

Q. Based upon the weather report as shown on September 5th, 1913, under Libelant's Exhibit No. I, would it have been possible for the "Hardy" or any other steamship to launch a small boat in the lower Coos Bay?

Mr. PECK.—Objected to as incompetent, irrelevant and immaterial and not tending to prove or disprove any of the issues of this case.

A. A boat could have been launched in the lower bay, but probably not on the bar—can't call that the lower bay. Anywhere in the lower bay a boat could have been launched, in my opinion, any time, such as steamers carry, life-boats.

Q. As shown by your report at sunset on September 5th, 1913, what, approximately, in miles, would be the velocity of the wind?

A. Four or five miles perhaps. Not over that.

Q. That would be per hour? A. Yes.

Q. And from what direction? A. Northwest.

Q. What was the condition of the barometer at the same time? A. The barometer stood 30.15.

Q. Is that a good barometer?

A. That is a good glass.

Q. As to the conditions of the surf, based upon Libelant's Exhibit No. I, what was the condition of the surf?

A. Quite moderate on the bar. We don't pay much attention to the beach surf. We look after the bar more. It was quite a moderate surf.

(Deposition of O. P. Britt.)

Q. What do you mean?

A. That it would not be breaking any. We would not say it was [33] breaking any on the bar, except on the spits—not in the channel.

Cross-examination by Mr. PECK.

Q. Mr. Britt, do you think that your observations at Coos Bay would throw much light on the condition of the sea at Point Gorda, on the California coast?

A. No, I do not. The weather conditions may be entirely different there at the same time.

Q. What was the chance of the steamer “Hardy” on September 6th or September 7th being able to launch a small boat at sea at any point between Point Gorda and Coos Bay?

Mr. MULLEN.—Object to that on the ground that the witness has no visible personal knowledge of the conditions at Point Gorda, and as incompetent.

A. That is another question that I cannot answer. That is something that I would not know. Perhaps in the vicinity, from all records we have, a boat could have been launched.

Q. You cannot give any intelligent testimony about the condition of the weather except in the immediate vicinity of Coos Bay?

A. No, I cannot. That is all we have to go by, is what we can see.

Q. How far from the Coos Bay bar to sea do you think your judgment would be worth anything on a question as to whether you could launch a boat from the steamer “Hardy” on the dates in question?



(Deposition of O. P. Britt.)

A. Probably ten miles.

Q. Do you remember anything about the particular time that the "Hardy" took this tow to sea?

A. No, I just remember seeing her go down the bay with the tow, but I could not state what date it was without referring to my books.

Q. Do you remember what time of the day it was?  
[34]

A. Along in the afternoon. Probably anywhere between 2:30 and 5 o'clock, because I had been to Empire and I was going home in my boat and passed her on our way down.

Q. Did you notice at that time whether there was a light burning on the tow or not?

A. No, I did not. It was in daylight and I would not have seen it anyway.

Q. You have no recollection about that either way?

A. No, I would not know.

Q. Did you notice particularly that day how close she stood to the water?

A. No, sir, I know they were towing with quite a short line down the bay, but I suppose they lengthened it when they got to the bar.

Q. Did you note that the tow was a flush decked barge over which the seas washed continuously?

A. Yes. No seas washing over though.

Q. Over which the seas would wash continually in a rough sea?      A. Yes.

Q. Even at that time on September 5th, 1913, when you noted it going down the bay, do you think it would have been possible at sea off Coos Bay, to board



(Deposition of O. P. Britt.)

the tow in a small boat from the "Hardy" and return to the "Hardy"?

A. Yes, I think it would so far as anything that I know.

Redirect Examination by Mr. MULLEN.

Q. Captain, do you know the distance from the Coos Bay Bar to the Porter Mill?

A. No, I could hardly say. [35]

Q. Now, Captain Britt, you think then that on the evening of September 5th a small boat could have been launched any place in the lower inner bay and, except on the bar itself, for a distance of about ten miles out to sea?

A. Yes, I believe in my judgment that could have been done without any risk, so far as anything that I know.

Recross-examination by Mr. PECK.

Q. On Libelant's Exhibit No. I, your report for Saturday in the original book under the head of General Remarks shows an accident on the bar to a fishing-boat, does it not? A. Yes.

Q. Just what did happen on the bar that night, in your own language, Mr. Britt?

A. Well, about seven o'clock I think this happened. That night when they saw three fishing-boats attempting to cross in over the bar, the last one was swamped, and we went out after that in the life-boat. We finally found it by the whistling-buoy, after cruising around a while, I think about nine o'clock. I think it was about nine o'clock that we found the

(Deposition of O. P. Britt.)

boat; we took it in tow and attempted to go into Big Creek with it so we laid out all night and came in the next morning. It was a little too dark to come in for what we had on ahead so we laid out and came in the next morning. This boat that swamped would not have swamped but it got out of the channel on the spit.

Q. But on the night of September 6th you did not regard it as safe to come in over the bar with the boat that had been swamped, and you laid out over night?

A. Yes. I didn't regard it as being safe on account of being dark, with a swamped boat in tow.

(Witness excused.) [36]

**[Deposition of L. H. Christensen, for Libelant.]**

L. H. CHRISTENSEN, called for libelant, sworn.

Direct Examination by Mr. MULLEN.

Q. State your name, age, residence and occupation.

A. My name is L. H. Christensen, fifty-three years old, occupation ship carpenter.

Q. What various occupations have you followed, Mr. Christensen?

A. Well, from sailor, fisherman, miner and carpenter.

Q. About how many years' experience have you had in acting as a sailor and fisherman?

A. About twenty-five, I think.

Q. What was the nature of the work you performed as sailor?

A. Well, part of the time as common sailor, part

(Deposition of L. H. Christensen.)

of the time as officer and mate, and part of the time as captain.

Q. How long have you worked as a ship carpenter?

A. Off and on for about a dozen years. I can't tell exactly. Not continuously, but off and on.

Q. Where are you now employed?

A. I am employed at Kruse and Banks' in Porter.

Q. Were you employed by Kruse and Banks, and did you assist in the construction of a certain scow or barge which the American steamship "Hardy" took in tow on the date September 5th, 1913?

A. Yes.

Q. State whether or not in your opinion that barge or scow was staunchly built and seaworthy.

Mr. PECK.—Objected to as the witness is not qualified.

A. Yes, in my opinion it was well built—I think as well built as anything could be built.

Q. Were you present when the scow left for San Francisco? A. Yes.

Q. What was the nature of the light which was placed on the scow? [37]

A. To the best of my recollection the light was the same kind of light as they use for beacon lights here on the bay.

Q. It would be considered a standard light at that time? A. Yes.

Cross-examination by Mr. PECK.

Q. What kind of a light was it?

A. It was a range-light, of corrugated glass. I



(Deposition of L. H. Christensen.)

don't know its dimensions, but it must be over eight inches in circumference.

Q. Did you ever have any occasion to examine particularly the range-lights on the bay?

A. Not particularly. I have noticed them and seen them lights all the time. I have not noticed them particularly.

Q. What makes you think it was the same kind?

A. Because it looked like the other lights there is on the bay.

Q. How long since you examined some of the range-lights on the bay?

A. Two or three months, maybe more.

Q. Have you ever attended those lights?

A. No.

Q. What opportunity have you had for examination of the range-lights?

A. Passing by them, and also having hold of them.

Q. Did you ever light one of them?      A. No.

Q. You never examined them any more than anybody else would that happened to go near them?

A. Maybe not.

Q. You never took any particular notice of them, did you?

A. Yes, I took particular notice of them, because I am familiar with lights—have been, and took particular notice of them because they were first class lights.

Q. Where did this light come from that was placed on the barge? [38]

A. I can't say for certain, but I believe it came

(Deposition of L. H. Christensen.)

from one of the keepers of them lights.

Q. Where did you get it from?

A. I saw it placed on the barge.

Q. Where did it come from when they put it on the barge?

A. I don't know where it came from.

Q. Can you describe it a little more as to just what kind of a light it was?

A. No, I can't do it. Would not know where to begin and where to end.

Q. What kind of oil did it burn?      A. Lard oil.

Q. What kind of a wick did it have?

A. I don't know.

Q. How much lard oil was placed in the lamp?

A. I don't know.

Q. Was it placed stationary or was it placed on a swing?

A. It was placed on a square scaffold raised on the deck of the barge itself and placed so it would swing perpendicularly and still not swing around.

Q. Was that light burning when the boat went out?      A. I don't know.

Q. Did you see it when it left the dock?

A. I don't remember.

Q. Do you remember whether the light was lit when the boat left or not?      A. No.

Q. You still work for Kruse and Banks?

A. Yes.

Q. Did you work on this particular barge?

A. I worked a little on it, I don't remember how much. [39]

(Deposition of L. H. Christensen.)

Q. Did you ever have any experience in towing?

A. Yes.

Q. How much?

A. I don't know. Quite considerable.

Q. Do you know what kind of a barge it takes to make a good, staunch towing barge; do you know the elements that go to make up a staunch towing barge? A. I don't understand your question.

Q. Some boats might make staunch boats to sail or move under their own power, but would not be very good to tow.

A. Well, a scow, yes, ought to be a good towing barge.

Q. You think this barge was built staunchly for towing purposes? A. Yes.

Q. How much have you ever been in the towing business?

A. I have not been in the towing business but very little, but I have been towing to sea considerable.

Q. You never been on a tow-boat?

A. I have been towing but very little.

Redirect Examination by Mr. MULLEN.

Q. Do you remember at what time the Hardy left the Porter Mill wharf with the barge in tow?

A. No.

(Witness excused.) [40]



[Deposition of J. Dunson, for Libelant.]

Mr. J. DUNSON, called for libelant, sworn.

Direct Examination by Mr. MULLEN.

Q. State your name, age, residence and occupation.

A. Joseph Dunson, keeper of Cape Arago Lights. Fifty-eight years of age.

Q. The Cape Arago Lights at the entrance to Coos Bay? A. Yes.

Q. How long have you been keeper of the Cape Arago Lights?

A. Cape Arago Lights, two years this August.

Q. How long prior to that time have you been keeper of other lighthouses?

A. Twenty-three years. That is, all told, I am on my twenty-fourth year.

Q. You were the keeper of the Cape Arago Lighthouse on the 5th day of September, 1913, were you?

A. Yes.

Q. Just go ahead and state the general condition of the weather and the sea on the evening of September 5th, 1913.

A. Sir, I have it in my journal It was light north-westerly wind.

Q. What was the condition of the surf?

A. Moderate. What I called moderate, I got it down.

Q. Are you testifying from your personal recollection or from the journal itself?

A. No, sir; from the journal itself.

(Deposition of J. Dunson.)

Mr. PECK.—I move to strike out the evidence of the witness as not the best evidence.

Q. Have you got your journal with you?

A. No, sir. No, but I went and looked at it before I came up, but as nobody had said anything about bringing it along I did not bring it. [41]

Q. Have you any independent recollection of the condition of the weather on the evening of September 5th, 1913, without reference to your journal?

A. Well, I remember of the “Hardy,” when she towed the barge outside. I remember she stopped outside the bell-buoy either to light her light or lengthen her line. I was in the tower at the time getting ready to light up.

Q. Where is the bell-buoy located?

A. It is located on what is known as Baltimore Rock.

Q. Is it inside or outside the Coos Bay Bar?

A. Outside, sir.

Q. Do you know at what time the “Hardy” crossed out?

A. No, I know I was in the tower getting ready to light the light and the time that I speak of was when she was off the bell-buoy.

Q. About, to the best of your judgment, what time would that be?

A. Between five and six o'clock, I should judge. I could tell by looking, if I was to home. It was at sundown, whatever time that would be at that time of the year.

(Deposition of J. Dunson.)

Q. What was the condition of the surf and the sea at that time?

A. Well, it wasn't bad. Couldn't consider it bad at all.

Q. You recall that from your own recollection?

A. Yes.

Q. Without reference to any records?

A. Yes.

Q. What was the condition of the wind?

A. It was westerly wind outside.

Q. Was it a strong wind?

A. No, sir; I should call it a light wind.

Q. Then as to the time that the "Hardy" crossed out, you have no way of fixing that time?

A. No, only at sundown we light our light. Just what time it was [42] at that time of year, I think it was between five and six o'clock. Between the bar and bell-buoy is about twenty minutes with a barge in tow.

(Witness excused.) [43]

**[Deposition of K. V. Kruse, for Libelant.]**

Mr. K. V. KRUSE, called for libelant, sworn.

Direct Examination by Mr. MULLEN.

Q. State your name, age, residence and occupation.

A. My name is K. V. Kruse, sixty years of age, residence, North Bend.

Q. Are you a member of the copartnership composed of K. V. Kruse and Robert Banks?

A. Yes.



(Deposition of K. V. Kruse.)

Q. One of the libelants in this suit?

A. Yes, supposed to be.

Q. How many years' experience have you had in the building of boats, vessels and scows, Mr. Kruse?

A. I was in a shipyard when I was fourteen years old.

Q. You have been there ever since?

A. I have been there ever since, except six or seven years at sea.

Q. Approximately how many boats, vessels, scows and sea-going ships or vessels have you built or worked on?

A. Well, of course while we have been in business— It is pretty hard to tell.

Q. What you have worked on?

A. Fifty or fifty-one since we have been in business, and I suppose I have worked on several hundred before that.

Q. Did you have an opportunity to inspect and look over the barge or scow which the "Hardy" towed to San Francisco last fall that was lost?

A. Well, partially. I planned or designed it. My partner had charge of the building of it. Of course, I was there right along, more or less.

Q. State whether or not this barge was staunchly built and a seaworthy barge.

A. Yes, she was quite staunch and seaworthy. The inspector in [44] San Francisco can testify to that. Mr. Percival (?), you can refer to him.

Q. Can you state at what time the "Hardy" left the Porter Mill wharf with the barge in tow on the

(Deposition of K. V. Kruse.)

evening of September 5th, 1913?

A. Yes; ten minutes past five o'clock. I know, because the men had quit work at five o'clock, and I looked at my watch when she left.

Q. Describe, as nearly as you can, the nature and kind of a light that had been placed on the scow.

A. The light we obtained from the Government man who attends to the Government lights. It was about ten inches in diameter, corrugated glass, and stands about two feet high, I should judge. It is what they use on these beacons in the bay, the same light.

Q. What kind of oil do they burn?

A. I can't exactly tell. I forget the name of it, but what they use in this was a sort of a lard oil, I think. Mr. Banks got the oil from the lighthouse-man that attends to the beacon lights. Signal oil, is the name of it.

Q. Was the light on the scow lit at the time it left?

A. It was lit before she left. I helped to light the lights. Captain Jackson and myself lit the lights and it was burning when the barge left. I told him to see that the light was burning before they left; and it was burning when they left.

Cross-examination by Mr. PECK.

Q. Did you recover and cause to be repaired, this barge, Mr. Kruse?

A. We received our insurance. Whatever the insurance amounted to, I forget now exactly what we did receive.



(Deposition of K. V. Kruse.)

Q. Did your insurance cover all the expenses?

A. We had nothing to do with it. We had the barge insured [45] from here down and whatever damage and expense there was, the insurance company attended to that.

Q. Then personally the firm of Kruse & Banks had been out no money because of any damages?

A. No, we are not out any.

Q. The insurance company has paid off the damages and expense of recovery?

A. Yes, so far as I know, unless it may be part of Mr. Bank's expenses going to San Francisco.

Q. How long was this light supposed to burn?

A. We had put up the same kind of light on the other barge and that burned after we got into the city. Supposed to burn at least sixty hours, I believe. The other light burned that length of time.

Q. Do you know whether the light had oil in it when the barge was recovered?

A. That I do not know.

Q. Did she have a full supply of oil when you lighted the lamp?

A. Yes, the lamp was full, and I gave the captain a gallon of oil in case it should run short, and also gave him an extra lamp-glass in case it should break.

Q. How do you reconcile your testimony that the barge left here at ten minutes past five o'clock, when the lighthouse-keeper says that he saw it at the bell-buoy outside the bar at the time he was lighting his light.

A. I know because I am sure. He ain't. I am



(Deposition of K. V. Kruse.)

positive. I can swear to it.

Q. You think, then, that the lighthouse-keeper must be mistaken.

A. Yes. The ship's log will tell that if the captain put it down right.

(Witness excused.) [46]

**[Deposition of L. F. Falkenstein, for Libellee.]**

L. F. FALKENSTEIN, called for libellee, sworn.

Direct Examination by Mr. PECK.

Q. State your name, age, residence and occupation.

A. L. F. Falkenstein, age thirty-eight, residence, North Bend Oregon.

Q. What is your business? A. Office man.

Q. For whom? A. Simpson Lumber Company.

Q. In what capacity are you employed by the Simpson Lumber Co.? A. Cashier.

Q. Were you so employed by the Simpson Lumber Company on September 5th, 1913? A. Yes.

Q. Were you in the office of the Simpson Lumber Company at North Bend, Oregon, on the date that the American steamship "Hardy" towed a barge built at the Kruse & Banks ship building yards at North Bend, Oregon, from North Bend to San Francisco, said time being approximately September 5th, 1913?

A. I was either in the office or on the wharf, because I saw the vessel go by with the barge in tow, but I do not remember just where I was.

Q. Did you have any conversation with K. V. Kruse or R. Banks, or either of them, with reference

(Deposition of L. F. Falkenstein.)

to the tow-line by which said barge was being towed?

A. I had a conversation over the telephone with a man about the tow-line, and I would say it was Banks.

Q. Where were you and under what circumstances did this conversation occur? [47]

A. I was in the office of the Simpson Lumber Company, and when I answered the telephone call he asked if the "Hardy" could have a tow-line to tow the barge to San Francisco, and I told him that the tow-line was in the office, but he would have to see Captain Edgar about the loan of it. That is, the tow-line was in the building, not in the office.

Q. Did the party on the other end of the telephone tell you who it was that was speaking? A. No.

Q. Did you recognize the voice as being the voice of any particular person?

A. I inferred that it was Mr. Banks from his voice I have had several conversations over the telephone with him and always recognized his voice when talking.

Q. Is it customary or usual for Mr. Banks in talking with you over the telephone to tell you who is speaking? A. No.

Q. At this time, are you satisfied as to the identity of the person who was talking with you over the telephone? A. In my own mind I am, yes.

Q. And in your own mind you are satisfied that that person was who? A. Mr. Banks.

Q. Mr. Robert Banks, one of the libelants in this suit? A. Yes, Mr. Robert Banks.



(Deposition of L. F. Falkenstein.)

Q. Copartner with K. V. Kruse in the ship building business?

A. Yes, of the firm of Kruse & Banks.

Q. Now, state as near as you can, word for word, just what Mr. Banks said to you over the telephone on the date mentioned.

A. When he called, as I said before, he asked if the "Hardy" could have the hawser to tow the barge to San Francisco. [48]

Q. What was your reply, as near as you can remember?

A. I told him that the hawser was in the building and he would have to make arrangements with Captain Edgar, that I had no authority to let the hawser go.

Q. At the time of the conversation, did you see the hawser?

A. Yes, I turned from the 'phone and looked out into the old store building when I talked to him and saw it.

Q. How long afterward was the hawser taken?

A. Within the next two days. I do not remember just when. I wasn't at the office when the hawser was taken away.

Q. Do you know who got the hawser?

A. Some of the steamship "Hardy's" crew.

Cross-examination by Mr. MULLEN.

Q. Mr. Falkenstein, what time of day do you recall it crossed out? A. I cannot say.

Q. Did Robert Banks have more than one con-



(Deposition of L. F. Falkenstein.)

versation with you last fall relative to the securing of the hawser?

A. Not that I remember of. I remember of only one conversation.

Q. Have you any way of fixing the time when that conversation took place? A. I have not.

Q. Do you know whether or not there was a second barge towed from the Kruse & Banks Shipyards about this same time?

A. There were two barges towed down that I am sure of.

Q. Have you any way of fixing the conversation that you had with Mr. Banks relative to the tow-line, as to which barge he was talking in regard to?

A. No, I have not.

Q. You do not know whether it was the barge the "Hardy" towed or the other barge? [49]

A. This barge that this conversation was in regard to was the barge that the "Hardy" towed, because he asked for the tow-line for the "Hardy."

Q. But you, representing the Simpson Lumber Company, did not authorize any person to take the line, did you? A. No, sir.

Redirect Examination by Mr. PECK.

Q. Do you remember whether you stated that he could have it if satisfactory with L. J. Simpson as well as Edgar, or whether you referred to only one of the Simpsons?

A. I just referred to Edgar. I remember that. I said you will have to make your arrangements with

(Deposition of F. L. Falkenstein.)

Edgar. I did not say Edgar Simpson, but knew he would know who I was talking about.

Q. Do you know that the tow-line was taken within two days after that conversation?

A. About that time.

Q. And was that the trip of the "Hardy" in which she lost a barge belonging to Kruse & Banks?

A. Well, I don't know that she lost two, but the time I saw her going out I know that she lost that barge, from hearing of it afterwards.

Q. And when was the telephone communication which you had with Mr. Banks with reference to the time that you saw her go out?

A. A few days before that.

Q. How long before?

A. It wasn't over two days, I don't believe.

(Witness excused.) [50]

**[Deposition of Edgar M. Simpson, for Libelee.]**

EDGAR M. SIMPSON called for libelee, sworn.

Direct Examination by Mr. PECK.

Q. State your name, age, residence and occupation.

A. Edgar M. Simpson, age thirty-three, residence, North Bend, Oregon, lumber business.

Q. Are you connected with the Simpson Lumber Company, and if so in what capacity?

A. Manager of the Simpson Lumber Company.

Q. Were you manager of the Simpson Lumber Company in September, 1913? A. Yes.

Q. Do you remember of the trip which the American steamship "Hardy" made towing a barge for



(Deposition of M. Simpson.)

Kruse & Banks from North Bend to San Francisco, leaving Coos Bay on September 5th, 1913?

A. I remember she made a trip about that time.

Q. What do you know about the tow-line which was used by the steamship "Hardy" in towing that barge?

A. I know that the line belonged to the Simpson Lumber Company.

Q. How was it obtained from the Simpson Lumber Company and who obtained it?

A. The shipyard telephoned to our office and asked permission for the use of the line. Mr. Falkenstein answered and told them it was all right if I was willing. He afterwards mentioned it to me and I said it was all right.

Q. Did you have any conversation with the master of the steamship "Hardy" before he sailed on that trip with reference to the tow-line? A. Yes.

Q. What was that conversation?

A. I met him somewhere and he asked me if I was going to charge him for the use of the line. I told him no, that the shipyard would have to pay.

Q. To whom did you understand that the Simpson Lumber Company was [51] loaning the line?

A. Kruse & Banks shipyard.

Cross-examination by Mr. MULLEN.

Q. Did either Mr. Kruse or Mr. Banks say anything to you in reference to the tow-line?

A. At the time or after?

Q. At the time. A. Not that I remember of.



(Deposition of M. Simpson.)

Q. Just tell what Falkenstein said to you in reference to the tow-line?

A. Nothing was said to me about the line except that Falkenstein mentioned the fact that he had been called up and asked for the line.

Q. Do you know when that was?

A. No, I do not remember.

Q. Did Mr. Falkenstein tell you in his conversation what the tow-line was wanted for?

A. I guess he must have said it was for the "Hardy."

Q. Do you remember whether or not he did say so?

A. No, I cannot say for sure.

Q. Or do you know whether or not it was with reference to the particular barge in question?

A. No, I cannot say that positively.

Q. If there was another barge shipped about a week later, might it have been in reference to the tow-line for that barge?

A. Yes, it might have been.

Q. Then you never authorized Kruse & Banks, or either of them individually, to get the tow-line?

A. Not personally no. [52]

Redirect Examination by Mr. PECK.

Q. If it had been a subsequent barge that had been towed by some other vessel then you would not have told the master of the steamship "Hardy" that you wanted to charge this particular tow-line to Kruse & Banks? A. No, certainly not.

Q. You do know by reason of your conversation

(Deposition of M. Simpson.)

with the master of the steamship "Hardy" that the tow-line in question had to do with the towing of this particular barge by the steamship "Hardy"?

A. That is my impression that this is the barge it was for.

(Witness excused.) [53]

**[Recital as to Libelant's Exhibit No. 1.]**

(Libelant's Exhibit No. 1, which was originally attached to the original depositions of O. P. Britt et al., at this place, has been detached and is transmitted to the Circuit Court of Appeals in its original form, as per order of Court pertaining thereto.) [54]

---

[Title of Court and Cause.]

**Depositions Taken Before U. S. Commissioner,  
Krull.**

BE IT REMEMBERED that on Monday, May 25, 1914, pursuant to the notice hereto attached, and the stipulation of counsel entered herein, at the office of Messrs. McClanahan & Derby, No. 1101 Merchants Exchange Building, in the City and County of San Francisco, State of California, personally appeared before me, Francis Krull, United States Commissioner for the Northern District of California, Richard C. Brennan.

Messrs. McClanahan & Derby appeared as proctors for libelant, and Nathan H. Frank, Esq., appeared as proctors for respondent, and the said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth



in the cause aforesaid, did thereupon depose and say as hereinafter set forth.

(It is hereby stipulated and agreed by and between the [58] proctors for the respective parties, that the deposition of Richard C. Brennan may be taken *de bene esse* on behalf of the libelant, at the office of Messrs. McClanahan & Derby, Room No. 1101 Merchants Exchange Building, in the City and County of San Francisco, State of California, on Monday, May 25, 1914, before Francis Krull, a United States Commissioner for the Northern District of California, who is fully authorized to take acknowledgments of bail and affidavits, etc., and in shorthand by Charles R. Gagan.

It is further stipulated that the deposition, when written out, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections to the form of the questions are waived, unless objected to at the time of taking said deposition, and that all objections to the materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the reading over of the testimony to the witnesses and the signing thereof is hereby expressly waived.) [59]

**[Deposition of Richard C. Brennan, for Libelant.]**

RICHARD C. BRENNAN, called for libelant, sworn.

Mr. DERBY.—Q. What is your occupation?

A. Master mariner.



(Deposition of Richard C. Brennan.)

Q. How long have you been a master mariner?

A. I have been a master mariner three years; I have been going to sea for 18 years.

Q. What vessel are you on now?

A. The steamship "Admiral Farragut."

Q. Where does she ply?

A. From San Francisco to Seattle and Tacoma.

Q. Are you leaving this afternoon for Seattle?

A. Yes, sir.

Q. In the month of September, 1913, what vessel were you on?      A. On the steamship "Watson."

Q. Were you on her as master?

A. I was master.

Q. Do you remember, Captain, making a voyage from San Francisco to Seattle on the "Watson" upon which you left San Francisco on September 6, 1913?      A. Yes.

Q. What time did you leave San Francisco on that day?      A. I left on September 6th.

Q. I mean at what time?

A. At 3:51 P. M. in the afternoon.

Q. Do you remember seeing a barge, Captain, at any stage of that voyage?      A. Yes, sir.

Q. When was it?

A. It was on the morning of the 7th, at 7:05 A. M.

Q. Where were you when you saw that barge?

A. I was up in about latitude 39 degrees 45 minutes north, longitude 124 degrees 10 west. I was about 23 or 24 miles northwest of Fort Bragg.

Q. How far were you offshore?

A. Possibly eleven or twelve [60] miles.

(Deposition of Richard C. Brennan.)

Q. Where was the barge in relation to your vessel?

A. When I seen the barge, it was about two miles outside of me, to the west of me.

Q. Did you go any closer to the barge?

A. Yes, I altered my course and went out right close to her, 300 or 400 feet from her, and looked at her.

Q. What kind of a barge was it?

A. It was a flush-deck barge, red painted, about 40 by 80, or something like that.

Q. Could you tell whether it was a new or an old barge?

A. It was a brand new barge, I was right close to it.

Q. Was your vessel going on her usual course between San Francisco and Seattle?      A. She was.

Q. How was the barge, with reference to being in the fairway of the usual course of vessels, or not?

A. Yes, she would be right in the fairway.

Q. Was there any light on the barge?

A. There was a tripod there with a lantern, but I don't think the light was lit. It was daylight. There didn't seem to be any light. There was a tripod there for a lantern.

Q. Was there anyone on board the barge?

A. No, sir.

Q. How was the weather, with reference to its being clear or foggy at the time the barge was sighted?

A. The weather up to that time had been clear.

Q. Did you see any towing-line on the barge?

A. Yes, there was a wire bridle and it had some



(Deposition of Richard C. Brennan.)

part of a hawser attached to it; I could not tell how much, because it led from each corner of the barge down into the water; it was dragging.

Q. Was the bridle intact?

A. The bridle was intact, yes, sir. [61]

Q. Now, Captain, will you take this chart and draw on it the position where that barge was when you sighted her? A. Yes, I will.

Q. Mark that "X." (The witness does as directed.)

Q. Now, the center of that "X," as I understand it, is where you saw the barge; is that correct?

A. That is correct.

Mr. DERBY.—I offer the chart in evidence and ask that it be marked "Libelant's Exhibit A."

(The chart was here marked by the Commissioner, "Libelant's Exhibit A.")

Cross-examination.

Mr. FRANK.—Q. Mr. Brennan, I notice that you testify as to your latitude and longitude without any memorandum as an aid; you, of course, don't remember that after all this length of time, do you; you have not that in your memory, have you, all this time?

A. No, sir, not all the time, but I have my log-book, and I looked up the log-book to see the position of my ship at that time.

Q. Was the log-book kept by you?

A. The log-book was kept by my officers and signed by me; it is the official log.

Q. And the observation on which you fix this is not



(Deposition of Richard C. Brennan.)

entered in the log by you, is it?

A. No, sir. I have my commander's report and I entered it up in there, I copied that. That is entered by me.

Mr. FRANK.—Of course, we will have to object to that testimony upon the ground that it is hearsay.

The WITNESS.—Then I will show you this. (Showing commander's report.)

Mr. FRANK.—Well, that doesn't make it any better.

The WITNESS.—All right. [62]

Mr. FRANK.—Q. What was the condition of the weather from here up to the point when you sighted the barge?

A. There had been strong northwest weather, wind.

Q. And that same weather was prevailing when you got up there alongside of the barge?

A. The wind was dying out. The sea still remained, but the wind was not nearly as strong as it had been during the night.

Q. The sea was still heavy, was it?

A. The sea was still pretty heavy, yes, sir.

Q. You said it was clear up to that time; I suppose you mean it was clear on your way up the coast?

A. Yes, sir.

Q. You don't know what the condition was in the neighborhood of the barge, or where she was lost, during the time you were traveling from here up there? A. No, I could not say that.

(Deposition of Richard C. Brennan.)

Q. Was it misty or hazy at the time you sighted the barge?

A. No, it was just the ordinary weather you would have with the northwest wind. It was dying out. I seen Point Arena and Point Cabrillo and all the lights along the shore; you could see a long distance.

Q. That is, on your way up? A. Yes, sir.

Q. I mean at the location where the barge was?

A. Yes, you could see well when I seen the barge.

Q. Did the fog set in shortly afterwards?

A. Yes. It was a drifting fog. I got it probably an hour later; there was a little patch of it, and then we ran right out of it again. There was no fog bank, or anything like that; it was just a drifting fog that you get sometimes with strong northwest wind.

Q. That was when you got further up, was it not?

A. Yes.

Q. That was less than an hour after you sighted the barge? [63] A. Somewhere around that.

Q. How long did you delay in the vicinity of the barge?

A. We didn't stop at all hardly. I seen the barge a couple of miles outside of me and I put my helm hard aport and ran out there and went right on.

Q. Why didn't you pick her up?

A. Well, I was bound the wrong way; I could not tow her 600 miles. If I was going south, I would have picked her up, believe me; she looked good to me.

Q. Why didn't you pick her up and take her into the nearest port?

(Deposition of Richard C. Brennan.)

A. There was no port I could get into.

Q. How far was that from the port of San Francisco?

A. Around 145 miles, or something like that. I reported it to a steam schooner that afternoon. I thought he might pick her up. He didn't seem to understand me though, didn't understand what I said.

Q. When you say there was a heavy northwest sea, give us some idea about how heavy the sea was, how high the waves were?

A. We never measure them; we call the force of them by the action they have on the ship.

Q. Well, say the effect they had on the barge, for instance?

A. At that time the barge was riding along nicely; she was drifting along fine. I could have got aboard of her without any trouble at that time.

Q. Were her decks washed at all?

A. No, sir. She was flying light, running fine.

Q. How high did she sit above the water—her sides? A. She must be five feet free-board.

Q. That is what you judged?

A. Yes. She was not making any water. You could tell the way she floated on the [64] water she was nice and light.

Q. When you say she was flying light, you mean she was jumping up and down the waves light, is that it?

A. If a vessel has water in her, or is water-logged, she is heavy and moves slow; when a vessel has no



(Deposition of Richard C. Brennan.)

water in her, she is quick in her action.

Q. In other words, she was jumping quickly up on the waves, up and down?

A. No, sir; she didn't jump at all. As I tell you, she was just riding light.

Q. What do you mean by riding light? I don't understand that term.

A. If she had water in her, one end of her would go down; when she lifts the water will go to one end, and she is loggy and slow and the waves would go over her then, if there are any waves at all; what we call light is when the vessel rides easy.

Q. She rides; in other words, she is up on one wave and down on the other?

A. At the time I passed her, the waves were not big at all; she was just riding along nice and smooth.

Q. I am trying to get you to give me some idea about how big the waves were; you say there was a heavy sea on.

A. There had been all night, but I told you at that time the sea was some better; it was in better shape then. There was not much wind at the time. The wind had been blowing up until midnight around Point Arena, but it died down that morning, and it freshened up a little bit again after we came up the coast; along in that stretch there up to Shelter Cove the weather was very good.

Q. Did you see the "Grace Dollar" at that time?

A. No, sir.

Q. You could not see her? A. No, sir.

Q. Of course, the condition of the wind and sea

(Deposition of Richard C. Brennan.)

and fog at the [65] time you were there would be no criterion of what they had been during the time the "Grace Dollar" was in the neighborhood?

A. You can't tell a thing about that, you know; it might be fine there all the time you are there and then later on it would be different.

Q. There might have been a heavy sea on and also very foggy at the time the "Grace Dollar" was there?

A. Of course, the sea cannot go down very quickly.

Q. I say there might have been a heavy sea and also very foggy at the time the "Grace Dollar" was there?

A. I don't know what time she was there, or anything about that, only I say that the sea don't go down in a minute; it stays for hours.

Q. It depends on conditions, does it not?

A. I don't know how soon she was there afterwards.

Q. I say that depends on conditions, does it not, how soon the sea would go down?

A. Largely; yes, sir.

Q. I notice that at 7:50 you have an entry in this log that the fog is setting in; "8:00 A. M., pretty clear; foggy; heavy head seas; shipping water forward." That was the condition within 45 minutes of the time you sighted the barge, was it not?

A. Yes, sir.

Q. And you had gone from the time you first sighted the barge out of your course a couple of



(Deposition of Richard C. Brennan.)

miles, passed around her and then resumed your course, did you not?     A. Yes, sir.

Q. How much time do you think you lost in doing that from your course?     A. 25 minutes.

Q. About 25 minutes?

A. Yes, sir; that is the time we were at the barge, at 7:05; the barge was right abeam then.

Q. Your entry is at "7:05 sighted a scow adrift, two miles on the [66] port beam, hauled out and passed close to her, but found no life on board."

A. That is right. It would be about 7:15 at the time I was at the barge. We put that down. We would be proceeding on our course, and it would be at right angles to our course.

Q. And it would take you some minutes to pass around the barge; you stopped, did you not, to observe her?

A. No, I did not stop, I was just right close to her, you see.

Q. And it would take you about ten minutes more to get back to your course?

A. Well, you don't run in for those two miles; I just shaped up the course again from the barge.

Q. Well, you lost about 20 minutes, you think?

A. Possibly that; not over that.

Redirect Examination.

Mr. DERBY.—Q. Captain, have you got your commander's report with you?     A. Yes, sir.

Q. Before testifying in this case, did you refresh your memory from your commander's report?



(Deposition of Richard C. Brennan.)

A. Yes, sir.

Q. And are you able to testify of your own knowledge to the facts you have testified to, after so refreshing your memory?     A. Yes, sir.

Recross-examination.

Mr. FRANK.—Q. You say you are able of your own knowledge to testify to the facts after refreshing your memory. You would not be able to refresh your knowledge of facts you did not originally know, independent of that memorandum, would you?

A. Well, you know when you are going up and down the coast like I am all the time, you cannot remember everything, but when I look through my commander's report I see it right away. [67]

Q. But your commander's report is made out from this log, is it not?

A. Yes, sir; it is an abstract log.

Q. What you mean to say is, you have consulted the commander's report instead of the log to ascertain the facts you have been testifying to; is that right?     A. Yes, sir.

Mr. DERBY.—Q. Captain, you saw this barge yourself, did you not?     A. I certainly did.

Q. And did you take an observation of where she was?

A. Yes, sir. There is nobody puts anything down on the log, or anything on board the ship, without my approval. I am the final one as regards to the ship.

Q. And at the time these entries were made, did

(Deposition of Richard C. Brennan.)

you have personal knowledge of all the facts entered there?

A. I did. I wired to the Hydrographic Office the position of the barge. [68]

**[Certificate of U. S. Commissioner to Deposition of  
Richard C. Brennan.]**

United States of America,  
State and Northern District of California,  
City and County of San Francisco,—ss.

I, Francis Krull, United States Commissioner for the Northern District of California, do hereby certify that the reason stated for taking the foregoing deposition is that the testimony of the witness, Richard C. Brennan is material and necessary in the cause in the caption of the said deposition named, and that said witness will be more than 100 miles from the place at the time of trial.

I further certify that on Monday, May 25, 1914, I was attended by Messrs. McClanahan & Derby, proctors for libelant, and Nathan H. Frank, Esq., proctor for respondent, and by the witness, who was of sound mind and lawful age, and that the said witness was by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth; that said deposition was, pursuant to the stipulation of the proctors for the respective parties taken in shorthand by Charles R. Gagan and afterwards reduced to typewriting; that the reading over and signing of said deposition of said witness was by the aforesaid stipulation expressly waived.

I further certify that I have retained the said deposition in my possession for the purpose of delivering the same under my own hand to the United States District Court for the Northern District of California, the court for which the said deposition was taken.

And I further certify that I am not of counsel nor attorney for any of the parties in the said deposition and [69] caption named, nor in any way interested in the event of the cause named in the said caption.

I further certify that during the taking of said deposition, an exhibit was introduced and marked as follows, "Libelant's Exhibit A," and that the said exhibit is herewith returned attached to said deposition.

IN WITNESS WHEREOF, I have hereunto subscribed my hand, at my office, in the City and County of San Francisco, State of California, this 28th day of May, 1914.

[Seal]

FRANCIS KRULL,  
U. S. Commissioner, Northern District of California,  
at San Francisco.

[Endorsed]: Filed Jun. 2, 1914. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [70]



[Title of Court and Cause.]

**Testimony Taken in Open Court.**

Tuesday, June 2d, 1914.

**APPEARANCES.**

For the Libellants: S. H. DERBY, Esq.

For the Respondent: NATHAN FRANK, Esq.

[71]

**[Proceedings Had June 2, 1914.]**

Tuesday, June 2, 1914.

Mr. DERBY.—If the Court please, this is a case of negligent towage. It is claimed that the steamer “Hardy” undertook to tow the barge of Kruse & Banks from North Bend, Oregon, to San Francisco, and that on the voyage the barge was negligently lost by reason of which libellant suffered damage in having to repair the barge, and also having to salve the barge and also through depreciation of the barge.

I am perfectly willing to go on with the whole case. I don't know whether your Honor desires to first hear the evidence on the question of liability and leave the question of damages to the commissioner, or whether your Honor would prefer to hear the case.

The COURT.—I will determine the question of liability. The condition of my calendar will not permit me to take up the other branch of it.

Mr. DERBY.—Very well, your Honor. I offer in evidence the depositions of O. P. Britt, L. H. Christensen, J. Dunson and K. V. Kruse, for the libellant, taken at North Bend, Oregon. I presume it will not be necessary to read those depositions.

The COURT.—Not unless there is something special you wish to call the attention of the court to.

Mr. DERBY.—I will simply call the attention of the Court in a general way to the fact that those depositions are to the effect that at the time this barge left North Bend she was staunch, strong and seaworthy, equipped with a proper light, that the weather was moderate and was calm, and that it would have been perfectly easy for the “Hardy” to launch a boat in that weather for the purpose of re-lighting the light. The [72\*—1†] light went out on the barge. Of course, Mr. Frank will disagree with me as to the effect of those depositions, but that is what I claim they establish.

I also offer the deposition of Captain R. C. Brennan, of the steamer “Admiral Farragaut.” Captain Brennan’s testimony is to the effect that on the day on which the barge was lost by the steamer “Hardy” he sighted the barge at eight A. M. in the morning, in the fairway, in the usual course of vessels, in a certain latitude and longitude which I will show or try to show was very near the latitude and longitude where the “Hardy” lost the barge.

I also refer to a stipulation as to the testimony of Captain Arthur Self. In order to avoid taking his deposition it was stipulated between the parties that Captain Self was the captain of the steamer “Iaqua,” that he made a voyage from Coos Bay to San Francisco, starting the day after the “Hardy”

---

\*Page-number appearing at foot of page of Original Certified Apostles.

†Original page-number appearing at foot of page of Testimony as same appears in Certified Apostles.



did and arriving at San Francisco at about the same time that the "Hardy" did, and that during the voyage the weather was comparatively calm, and with a smooth sea throughout.

I want to call Captain Peterson out of order, as he is desirous of getting back to his business.

**[Testimony of Henry C. Peterson, for Libellant.]**

HENRY C. PETERSON, called for the libellant,  
Sworn.

Mr. DERBY.—Q. Captain Peterson, what is your business?

A. Launch business, taking passengers back and forth.

Q. Do you own any barges?      A. Yes, sir.

Q. How long have you been in that business?

A. About 40 years.

Q. Do you remember, Captain, a barge coming to your place in [73—2] San Francisco in September, in tow of the steamer "Brunswick"?

A. Yes, sir.

Q. Was that barge turned over to you by the "Brunswick"?

A. She was turned over to me to take charge of by Captain Pillsbury.

Q. Did you take charge of it?

A. I took charge of it that evening.

Q. From the time that the barge was delivered to you, Captain Peterson, and until the time that it went on the ways at the place where it was repaired, did it suffer any further damage than it had already suffered?      A. No, sir.

Q. Did you eventually buy that barge, Captain?



(Testimony of Henry C. Peterson.)

A. I did.

Q. Was the barge before it came down under contract to be sold to you?      A. Yes, sir.

Q. Did you accept the barge under that contract?

A. No, sir.

Q. Why not?      A. Because she was damaged.

Q. Captain, what kind of a barge is that, with reference to other barge, with reference to it being easy to tow, or otherwise?

A. She is a very strongly built barge; I don't know how much stronger she would be than any other barges.

Q. I mean with reference to her towing qualities?

A. She is a very easy towing barge on account of her ends being very much more sloped than other barges.

Mr. DERBY.—I would like, if the Court please, to ask this witness one or two questions on the subject of damages, so as to avoid having to call him again. I will be very brief about it.

Mr. FRANK.—You might have to call him again for cross-examination.

The COURT.—Does the captain live here? [74—3]

Mr. DERBY.—He lives here in the city. His assistant is away, and he is alone at his business. I found it very difficult to get him to come up here this morning.

The COURT.—There is no occasions for us to go partially into the question of damages unless we go entirely into it, and the condition of my calendar will

(Testimony of Henry C. Peterson.)

not permit it very well.

Mr. DERBY.—Very well, your Honor, that is all.

Cross-examination.

Mr. FRANK.—Q. Have you the contract with you, Captain, under which you purchased the barge originally? A. No, sir, I have not.

Q. You have that down in your office, have you?

A. Yes, sir.

Mr. FRANK.—I think I will reserve that also until we come to the question of damages.

**[Testimony of Robert Banks, for Libellants.]**

ROBERT BANKS, called for the libellant, sworn.

Mr. DERBY.—Now, if the Court please, this witness has come down from North Bend, Oregon, to attend the trial, and I would ask as a special favor in his case to be allowed to put one or two questions to him on the question of damages, for the reason that he will shortly return to North Bend.

The COURT.—Very well.

Mr. DERBY.—Q. Mr. Banks, what is your business? A. Shipbuilding.

Q. Are you associated with anyone else in the building business? A. Yes, sir, K. V. Kruse.

Q. Under what name?

A. The Kruse & Banks Shipbuilding Company.

Q. Where do you do business?

A. North Bend, Oregon. [75—4]

Q. Do you remember building this barge which was towed down by the steamer “Hardy”?

(Testimony of Robert Banks.)

A. Yes, sir.

Q. When was she built?

A. She was built in July and August, 1913.

Q. For whom was she built?

A. For Henry Peterson, of San Francisco.

Q. What was the sale price?      A. \$4,000.

Q. How long have you been in the business of building barges?      A. Since 1906.

Q. Was this barge similar to other barges which you built?

A. In a way she was, but on account of Peterson's special business of lighterage here she had an extra long rake or run put on, as we call it.

Q. What is the effect of that extra long rake?

A. It makes them easy for towing. It would not be adapted to rock carrying.

Q. Who towed that barge to San Francisco?

A. The steamer "Hardy."

Q. Did you make any agreement with the steamer "Hardy" as to the towage of that barge?

A. Yes, sir.

Q. With whom?      A. With Captain Michaelsen.

Q. When was that contract made?

A. It was talked of when the barges were under construction, and I think settled along about the middle of August, that is, determined as to the price for the towing.

Q. Was it a verbal contract?      A. Yes, sir.

Q. What was the contract?



(Testimony of Robert Banks.)

A. It was to tow two barges to San Francisco for \$400.

Q. Was this barge that was damaged one of the barges?     A. Yes, sir.

Q. When did that tow start, Mr. Banks?

A. It started on September 5.

Q. At what time?

A. It left North Bend after five o'clock     [76—5]  
between five and five-fifteen.

Q. Who supplied the rope with which the towage was done?     A. The steamer "Hardy."

Q. When you say five or five-fifteen, do you mean in the afternoon?     A. Yes, sir.

Q. What condition was the barge in at the time the tow started?     A. First-class condition.

Q. Was she seaworthy?     A. Yes, sir.

Q. Was there a light on the barge?     A. Yes, sir.

Q. What kind of a light was it?

A. It was a government beacon light, such as is used on the range-lights on the bay. We secured it from the tender of the light, for the purpose of using it on the barge for towing down.

Q. How much oil was there in the lamp?

A. It would hold about a quart of oil.

Q. How long will that burn?     A. 60 hours.

Q. Was that all the oil you supplied?

A. No, sir, there was an extra quart of oil supplied and put under deck in the barge if necessary.

Q. Had you sent any other barges to San Francisco?     A. Yes, sir.

Q. Were they sent in a similar way?

(Testimony of Robert Banks.)

Mr. FRANK.—That is immaterial.

Mr. DERBY.—I will withdraw that.

Mr. DERBY.—Q. Did anyone go down to San Francisco on the barge?     A No, sir.

Q. Why not?

A. They did not consider it necessary, and being a small barge, there was danger.

Q. Do you remember what the weather conditions were when the barge left?     A. Good.

Q. How far is it from North Bend to the entrance of Coos Bay? [77—6]     A. About eight miles.

Q. When did you next see the barge?

A. I seen her on the 16th, here in San Francisco.

Q. On the 16th of September?

A. On the 16th of September, yes, sir.

Q. What condition was she in then?

A. She was water-logged and strained.

Q. Where did you see her?

A. At Mission street wharf, alongside of Peterson's boat landing.

Q. How soon after that was she taken to the repair ways?     A. Three days, or on the 17th.

Q. Where was she repaired?

A. At South San Francisco.

Q. By whom?     A. Schultz and Robinson.

Q. Who arranged for the repairs?     A. I did.

Q. Were you present while the repairs were being carried out?     A. Yes, sir.

Q. Did you approve the bill which was presented for those repairs?     A. Yes, sir.

Q. Did you have an agent in San Francisco, Mr.



(Testimony of Robert Banks.)

Banks?      A. Yes, sir.

Q. Who was that agent?      A. J. E. Davenport.

Q. How long had he been your agent?

A. Ever since we started in business.

Q. Did he have full authority to act for you?

A. Yes, sir.

Q. When did you hear of the loss of this barge?

A. On September 8th, by wire from Mr. Davenport.

Q. What did you do?

A. We wired in return to use all efforts and his best judgment in saving the property and wire us whatever was being done, wire us information.

Q. How long did you say you had been in the business of building barges?      A. Since 1906. [78—7]

Q. Have you sold barges for delivery in San Francisco?

A. Not that size; the other barges we delivered here were larger.

Q. But you have delivered barges in San Francisco?      A. Yes, sir, car floats.

Q. Will you state what the value of that barge, delivered in San Francisco in good condition, would be, Mr. Banks?

Mr. FRANK.—I think the value has already been proven by the contract itself.

Mr. DERBY.—I wish to prove that owing to her being built in North Bend, Oregon, instead of in San Francisco, she had a higher value in San Francisco than she would have there.

Mr. FRANK.—The contract price was for her



(Testimony of Robert Banks.)

delivery in San Francisco.

Mr. DERBY.—I know that, but that is not conclusive evidence on the subject.

Mr. FRANK.—The trouble about it is that Mr. Banks is suing here for damages for the loss of the barge. What were his damages?

Mr. DERBY.—Suppose you should claim that the value was less than the contract price. The mere fact that he contracted to sell her for \$4000 does not prevent him from proving that she had a higher value.

The COURT.—Maybe not, but it would prevent him from recovering for any higher value.

Mr. DERBY.—That would be a question for argument later.

The COURT.—You mean to say that after I sold a house to a man for a certain sum and it developed afterwards that I could get more from a third party than I got from the man to whom it was sold, that I would be entitled to that greater sum?

Mr. DERBY.—I am not prepared to say that at this time, [79—8] your Honor, that you could, but I submit that this evidence may become material.

The COURT.—It could only become material if the respondent would undertake to show that the value was less than that. On that theory, the testimony will be taken, but not for any purpose of increasing the amount above the sale price.

A. For barges similar to her dimensions and constructed along those lines, they pay from \$4500 to

(Testimony of Robert Banks.)

\$5000 here. Of course, we have to make some inducement building up the coast to get this work, and we built the barge for what we considered reasonable.

Q. (Mr. DERBY.) Did you make any efforts, after this barge was repaired and Captain Peterson refused to take her, to sell the barge?

A. We had seen several parties here who were interested in barges, such as Healy-Tibbitts, Crowley, and the Oakland Launch Company, trying to dispose of the barge.

Q. Were you able to get any offer for her?

A. No, sir, we got no offer.

Cross-examination.

Mr. FRANK.—Q. Mr. Banks, when did you have your first conversation with Captain Michaelsen about bringing this barge down?

A. I have not got the dates of that, but it is along in July. We built the barges in July and August, and it was along while we were building them, having them under construction. The Captain came in every eight or ten days, and I talked the matter over with him as to the towing, or what he would tow them for.

Q. Just relate what you said and what he said upon that subject?

A. I asked him to give me a price for towing two barges to San Francisco.

Q. When was that? A. That was in July, 1913.

Q. That was the first conversation?



(Testimony of Robert Banks.)

A. That was the first conversation. [80—9]

Q. What was his reply?

A. His reply was—I don't think he gave me a definite reply at first; he said he would let me know later.

Q. He said he would let you know later?

A. Yes, sir.

Q. When did he meet you again on the matter?

A. When he came back again I took the matter up, and he gave me a price, it was either \$450 or \$500, either one of the two, for towing the two of them, to take either two together or one at a time. I considered, of course, that that was too much, and I told him to think it over and let me know. He said he would consult his owners in the matter, and let me know when he came back, which would be, as near as I can remember, about the middle of August, and he agreed then that he would tow them down for \$400.

Q. You say he agreed; what was the conversation between you?

A. Just a verbal agreement talked of.

Q. What did you say and what did he say when he came back?

A. All that was said was that he would tow them down, instead of \$450 or \$500, he would take them down for \$400, or \$200 apiece.

Q. Under what special conditions, if any, did he say he would do that?

A. Not any, that I remember of.

Q. Did he not say to you at that time that the



(Testimony of Robert Banks.)

barges would be taken down entirely at your risk?

A. No, sir.

Q. You don't recall that?

A. No, sir, I don't recall it.

Q. Are you positive he did not say that to you?

A. I have no recollection of it.

Q. Is that the best you can say, that you have no recollection of it?      A. Yes, sir.

Q. You would not undertake to say positively that he did not say [81—10] that?

A. Yes, sir, I am positive, sure.

Q. Did he not also at that time tell you that you would have to supply the hawser, that he had no hawser?      A. Not definitely, no, sir.

Q. What did he say about it?

A. He spoke about a line; the question came up, and I think I told him—I am not definitely clear on that, I think I told him he could secure a line from the Simpson Lumber Company, that they had some tow-lines there, and he confirmed that later, that he could.

Q. Did he not tell you that he would not supply the tow-line, and that you would have to supply the tow-line?      A. No, sir.

Q. You are positive of that also?      A. Yes, sir.

Q. Did you not apply to the Simpson Lumber Company for the tow-line?

A. No, sir. Just a minute, at what date?

Q. I don't know anything about the date, I am asking you if you applied to them at any time for a tow-line for the "Hardy."

(Testimony of Robert Banks.)

A. Not before September 5th.

Q. Did you apply to them September 5th for it?

A. No, sir; not before that.

Q. Do you mean to say that you applied to them at some subsequent time? A. Yes, later.

Q. For the "Hardy"? A. No, sir.

The COURT.—Q. Do I understand, then, that you never applied for a tow-line for this tow?

A. Not till September 5th, no, sir.

Q. I don't just understand what you mean by September 5th.

A. To explain that, I will say that we had the second barge practically ready to tow here, and the "Hardy" on the return trip if she went through all right was to take the second barge for the same party. We built two for the same party. When we got [82—11] notice that the barge was lost, or that the "Hardy" lost the barge, we wanted to arrange to get the second barge to San Francisco; the steamer "Iaqua" was in port. I took the matter up with the captain of the "Iaqua" as to the towing. The captain did not have any tow-line; that was the way the application was made to the Simpson Lumber Company; on about the 8th or 9th we applied to the Simpson Lumber Company for a line to tow the second barge, which we secured from them for that purpose.

Q. Then your application had nothing to do with the towing of the barge that was lost? A. No, sir.

Mr. FRANK.—Q. Were you present in San Francisco, Mr. Banks, when Mr. Rosenthal, who repre-



(Testimony of Robert Banks.)

sented the insurance company here, and Mr. Derby went down to Mr. Simpson's office in San Francisco and interrogated him upon this question?

A. No, sir.

Q. Did you ever speak to Mr. Simpson about it?

A. Which Mr. Simpson?

Q. Mr. Edgar Simpson?      A. Yes, sir.

Q. When?      A. At North Bend.

Q. How long ago?

A. About the first of the year.

Q. Why did you go to Mr. Simpson to speak to him about it at that time?

A. In reference to a tow-line.

Q. I mean about this tow-line for the "Hardy" and about this dispute.      A. Yes.

Q. I say, why did you go to him at that time?

A. Because of a letter in reference to securing the line.

Q. You mean you wrote him a letter?

A. No, there was a letter that came to us about this line.

Q. You mean Simpson wrote you a letter in reference to it?      A. No, sir; Mr. Derby.

Q. Mr. Derby wrote you a letter respecting it?

A. Yes, sir. [83—12]

Q. And you went to Simpson?      A. Yes, sir.

Q. For what purpose?

A. The letter stated that the information was given him that we secured the line from Simpson, and I interviewed E. M. Simpson personally on the ques-



(Testimony of Robert Banks.)

tion, and he stated that this line was procured by the Captain of the "Hardy."

Q. Who stated that?      A. Mr. Simpson.

Q. He did?      A. Yes, sir.

Q. Do you know, as a matter of fact, that he has testified just to the contrary; you were present, were you not, when he testified?      A. No, sir; I was not.

Q. What did you put a light on her for?

A. That is the custom followed on all towing, to put a light.

Q. It is the custom to have a light, but why did you put it on if you were not taking the risk of that tow?

A. We always do. We always supply a light for every tow. On all the structures we build, we always supply the light for them.

Q. Who furnished the bridle that went on the tow?      A. We did.

Q. Who made it fast?      A. We did.

Q. Who made the tow-line fast to the tow?

A. Our men shackled it onto the bridle, so far as I know. I was not present at the dock when this was done, but Mr. Kruse was. We had two men on the barge for that purpose, and I think to my best judgment that that was done by our men.

Q. She was a flush-deck barge, was she not?

A. Yes, sir.

Q. That is, she was just flat like a table would be.

A. Just flat like a table, only that the hatches raised about fourteen inches.

Q. And those were in the center?

(Testimony of Robert Banks.)

A. Those were inside, that is, with a coaming raised and battened down.

Q. About how far were these hatches away from the side of the [84—13] vessel?

A. They were about ten feet.

Q. On either side? A. Yes, sir.

Q. And how much freeboard did she have?

A. She had about six feet.

Q. As much as that?

A. Between 5 feet 8 and 6 feet.

Q. On the side of the vessel, what sort of a fender did she have?

A. She had just what we call fore and aft fenders; that would be lengthwise. There was a 4 by 10 plank on the side, one on the top, one on the bottom and one three feet from the top.

Q. Spiked? A. Or bolted.

Q. You mean flush with the deck?

A. Yes, one flush with the deck.

Q. And that made a projection on the side of how much? A. 4 inches.

Q. Of 4 inches? A. Yes, sir.

Q. Did you say there were other fenders on her?

A. There is one 3 feet below that, and then one on the bottom, on the run, as we would call it, on the lower edge.

Q. That is flush with the bottom of the vessel?

A. Flush with the bottom, yes, sir.

Q. You have frequently been in the habit of telephoning to Mr. Falkenstein, of the Simpson Lumber Company, have you not? A. Yes, sir.

(Testimony of Robert Banks.)

Q. Sufficiently for him to recognize your voice and you to recognize his voice over the 'phone?

A. Yes, sir.

Redirect Examination.

Mr. DERBY.—Q. Did you telephone to Mr. Falkenstein with reference to getting this line for the “Hardy”? A. No, sir.

Q. Have you ever been sent any bill for this rope by the Simpson Lumber Company?

A. No, sir. [85—14]

Q. I wish you would explain again what your talk with Captain Simpson was in January.

A. I met Captain Simpson and I asked him what arrangement the Captain of the “Hardy” made with him about the line that he towed this barge with—

Mr. FRANK.—Just excuse me, when is this you are speaking of?

Mr. DERBY.—In January. I am referring to the conversation you brought out. Proceed with your answer.

A. (Continuing.) And Captain Simpson stated that the Captain applied for the line. He furthermore stated that the line had not been returned, and that the “Hardy” would be charged with the line. That is practically the substance of the conversation.

Q. Did you have a telephonic conversation later with Mr. Falkenstein with regard to supplying a line for the second barge? A. Yes, sir.

Q. What was the size of the barge?

A. Which one?



Q. The one that went down with the "Hardy."

A. She was 86 by 36 by 8 feet deep.

[**Testimony of Louis Rosenthal, for Libellant.**]

LOUIS ROSENTHAL, called for the libellant, sworn.

Mr. DERBY.—Q. What is your business?

A. Marine insurance.

Q. How long have you been in that business?

A. 31 years.

Q. Did you have the insurance on the barge of Kruse & Banks that was towed down by the "Hardy"? A. Yes, sir.

Q. When did you first hear that the barge had been lost?

A. I saw it in the "Chronicle" on the morning of September 8th, Monday morning.

Q. What did you do?

A. When I got down to the office, I called up Mr. Davenport, the agent of Kruse & Banks of the [86—15] shipbuilding company, who had placed the insurance, and I asked him what he knew about it, and he said he had already been in communication with the captain, and he expected to see the captain down at the channel where the "Hardy" was discharging. I told him to come up to the office and we would go down in my machine together, and we went down to the "Hardy."

Q. You went down to the "Hardy" that morning? A. Yes, sir.

Q. Did you have any conversation with the master of the "Hardy" with reference to the lost barge?

(Testimony of Louis Rosenthal.)

A. More or less, yes, sir.

Q. Could you state what that conversation was, Mr. Rosenthal?

Mr. FRANK.—What is the purpose of this?

Mr. DERBY.—The purpose is to bring out certain admissions made by the master of the “Hardy”; they may be used against the owner.

Mr. FRANK.—I think I shall enter formal objection to that at this time. I am aware of the fact that under certain circumstances admissions of the master would bind the owner, but my impression is it must be part of the *res gestae*. I may be mistaken about that, and I want to enter the objection upon that ground at the present time.

Mr. DERBY.—It is only when it is other officers than the master that it must be part of the *res gestae*. But the master represents the owner. I have a decision of the Supreme Court of the United States holding that such admissions by the master are admissible.

The COURT.—Of course, the general rule is that no admission by an agent as to a past occurrence is binding on the principal. I don't know how far that rule is applicable here, and for that reason we will take the testimony; its effect will be determined later.

A. We asked the captain of the “Hardy” when he had lost the [87—16] barge, and he said he didn't know, that I think it was the first officer had come and told him that night, about between 12 and one or after one, I have forgotten which, that they seemed



(Testimony of Louis Rosenthal.)

to have lost her tow. We asked him, among other things, whether his light was burning, or during the conversation the fact that his light went out developed, and we asked him why he did not re-light his light.

The COURT.—Q. You mean the light on the barge?

A. The light on the barge; he said he did not consider it necessary, that she was coming along all right.

Mr. DERBY.—Q. Did he say anything about its being too rough to launch a boat to light the light?

A. No, he did not; he simply said he did not think it was necessary, that she was coming along all right.

Q. Did he say anything to you with reference to the search made for the barge by the “Hardy”?

A. Well, yes, he told us he stayed around there until the morning, and for a couple of hours after the fog lifted, and then went about his business.

Q. Did he say anything about the amount of fuel that he had on board?

A. No, not while I was there.

Q. Did you see the rope which was attached to the “Hardy” as a part of the tow-line? A. Yes, sir.

Q. Where was that rope when you saw it?

A. Aft on the deck of the “Hardy.”

Q. What was the condition of that rope?

A. It was unraveled for quite a distance; it seemed to be all a mass of strands, loose strands.

Q. For how long a distance?

A. Oh, it was coiled up; I should say possibly ten



(Testimony of Louis Rosenthal.)

or twelve feet, or possibly more; there seemed to be a great mass of strands there. [88—17]

Q. What did you and Mr. Davenport then do?

A. We came back to the city and I left Mr. Davenport then to go to the National Steamship Company, to see what could be done about getting some assistance to bring the barge in if she could be found.

Q. When did you next hear that the barge was ashore? A. Wednesday morning.

Q. Was Tuesday a holiday?

A. Yes, Tuesday was Admission Day, September 9th.

Q. What did you and Mr. Davenport do when you heard the barge was ashore?

A. We communicated with the Caspar Lumber Company, upon whose property the barge had come ashore, but, getting no satisfaction, we decided to send Captain Pillsbury up.

Q. Captain A. F. Pillsbury?

A. Captain A. F. Pillsbury. We took the matter up and found that the morning train had gone, and that if he went up by the afternoon train he would not get there as quickly as we sent him up by the steamer "Brunswick" in the afternoon, and so we sent him up on the "Brunswick" in the afternoon, and he got there the next morning.

Q. Was it necessary to pay something for the salvage services?

A. Apparently, because there was some amount paid for salvage purposes. Captain Pillsbury telephoned down to me what that figure was, but Mr.

(Testimony of Louis Rosenthal.)

Davenport and I demurred to it as being rather high, and Captain Pillsbury telephoned that he considered it was fortunate to be able to make the contract that he did.

Q. I am not going to bring out the amount of the bill. Money had to be paid for the salvage?

A. Yes, sir.

Q. And money had to be paid for the repairs?

A. Yes, sir; and money had to be paid for getting the barge off and bringing her down. Some money had to be paid to the men who tied her to the rocks there, or who were supposed to. [89—18]

Q. And money had to be paid here for repairs?

A. Yes, sir.

Cross-examination.

Mr. FRANK.—Q. All of that money was paid by the insurance company, was it not?

A. Yes, Mr. Frank, under instructions from Mr. Davenport, agent for Kruse & Banks.

Q. And you paid it on account of your loss; in other words, all of the money that was paid out was paid by the insurance company in acknowledgment of its policy?

A. Sure, it was paid as part of the insurance.

Q. When you were down there talking to Captain Michaelsen, who else was present besides you and Mr. Davenport?

A. I think the first mate and the chief engineer.

Q. Is your recollection clear now that all that the captain said was that he did not think it was necessary, she was coming along all right?

(Testimony of Louis Rosenthal.)

A. That is all he said, yes, sir.

Q. Is your recollection clear on the subject now?

A. Fairly clear, yes, sir.

Q. Don't you know that he made the report at the time and said they could not get alongside to re-light that light?

A. He didn't make any statement of that kind in my presence.

Q. He did not make a statement of that kind in your presence?      A. No, sir.

**Redirect Examination.**

Mr. DERBY.—Q. Did you pay any losses without the approval of Mr. Davenport, the agent of Kruse & Banks?      A. No, none.

Q. For whose account were the payments made?

A. They were supposed to be made at that time for the account of Kruse & Banks.

Q. And then you later settled the matter, you adjusted your insurance.

A. Afterwards, yes.      [90—19]

**[Testimony of J. E. Davenport, for Libellant.]**

J. E. DAVENPORT, called for the libellant.  
Sworn.

Mr. DERBY.—Q. Mr. Davenport, what is your business?      A. Shipping and commission business.

Q. How long have you been in that business?

A. Ten or twelve years.

Q. Do you own a number of steam schooners?

A. Yes, sir.

Q. Do you know the steamer "Hardy"?



(Testimony of J. E. Davenport.)

A. I do.

Q. Did you have anything to do with this barge that was supposed to be towed down here by the steamer "Hardy" in September, 1913?

A. Yes, sir; in the first place, I was to attend to the insurance and then to see that she was delivered to Henry Peterson.

Q. Were you the agent here for Krews and Banks, the libellants in this case?      A. Yes, sir.

Q. When did you first hear of the barge's loss?

A. On the morning of September 8th, in the "Chronicle."

Q. What did you do?

A. I came over to the office and when I did there was a call in there from Captain Michaelsen, he called up the office. I had not got over from Oakland at that time. I immediately called him up and he commenced to tell me about the affair, and I told him I would come right down to the ship and see him if he would be there all the morning, and he said he would be there all the morning. And so I went down there about between 11 and 12 o'clock.

Q. Did anyone go with you?

A. Yes, sir, Mr. Rosenthal. We went down in his machine.

Q. Did you have a talk with the captain of the "Hardy" on board the "Hardy" on that morning?

A. Yes, sir.

Q. State, as near as you can, what the conversation was.

(Testimony of J. E. Davenport.)

Mr. FRANK.—That is subject to the same objection. [91—20]

The COURT.—Yes.

A. I asked to see the line and we went back to see the line on the after part of the deck.

Mr. DERBY.—Q. First, tell me what was the condition of the line?

A. The line was very badly frayed out, about 12 or 14 feet, fagged ends and frayed out. It had the appearance of being towed in the water a very long time before it was hauled aboard the ship.

Q. Are you familiar with the different conditions of hawsers? A. Yes, sir.

Q. And the unraveling would indicate it had been towed in the water for some time? A. Yes, sir.

Q. Now, please state what your conversation with the master of the “Hardy” was.

A. I asked the captain what time he lost his tow and he said it was after the watch had been changed at midnight, and the officer of the deck came to his room and stated that he thought he had lost the tow; that was about three-quarters of an hour after the watch had changed at midnight, between 12:45 and 1 o'clock; he said he immediately went aft and pulled the hawser in and found that he had lost the tow. In his report in the paper it stated that the barge was adrift and did not have any light on the barge, and it was a menace to navigation, and he wanted to report by wireless to that effect, that it was in the track of vessels. I asked the captain what time the light went out, and he said it went



(Testimony of J. E. Davenport.)

out the first night. I said, "Why didn't you light the light"; I said, "Did you tow that boat down the following day without lighting the light"? He said, "I didn't want to lower my working boat, she was coming along all right anyhow."

Q. Did he say anything about its being too rough to lower a boat? [92—21] A. No, sir, not at all.

Q. Did you have any subsequent conversation with the master of the "Hardy"?

A. Yes, sir, I did on the morning of the 10th. The captain brought in a copy of his notice of protest. In reading it I noticed he said he was short of fuel oil. I said, "Do you mean to say, Captain, you would start with a tow and only have sufficient fuel oil to bring the vessel in under most favorable circumstances and without any delay"? He said, "Oh, that part of it is all right, we had oil enough."

Q. Did he tell you why he put in his report the statement that he had not sufficient oil?

A. No, I don't recall that.

Q. Did you have any conversation with the captain with reference to the lookout on the "Hardy"?

A. Yes, I asked him if he had a man aft watching the hawser, and he said he did not, he didn't have any lookout only the man on the bridge. He had no man aft whatever to watch the line. I told him that was a very careless piece of work, I considered it.

Q. What did you do after you left the "Hardy," with reference to this barge?

A. I stopped at the National Steamship Com-



(Testimony of J. E. Davenport.)

pany's office to see if they would telephone up to their mill to have a launch go out and search for the barge, as the captain had told us the place the barge had gone adrift was to the northward and pretty well offshore Fort Bragg. I asked them if they would telephone up and send a launch out to scour the coast there and I would see that any reasonable bill would be paid, as I was representing Krews and Banks and they were reliable, and I would see that the bills were paid, and we wished to get the barge and secure her before she would go on the rocks or ashore.

Q. There is no need to relate the conversation. I just wanted [93—22] you to state the efforts you made.

A. Then the night intervened, and I went again on the morning of the 9th, and we learned that the barge had come ashore at Caspar and we wanted to see if they would send a launch down to Caspar and get the barge and bring her back with one of their own vessels. Mr. Johnson stated that as the barge was on the Caspar property, there might be some salvage claims, and he didn't like to interfere, and suggested that I take it up with the Caspar Lumber Company. I did that. I telephoned later to the Caspar Lumber Company, but could not get any satisfaction from them and then we concluded to send up Captain Pillsbury.

Q. Was Captain Pillsbury sent up with your approval, as agent for Kruse and Banks?

(Testimony of J. E. Davenport.)

A. Yes, sir.

Q. And I understand you approved these different bills that were paid by Mr. Rosenthal?

A. Yes, sir.

Cross-examination.

Mr. FRANK.—Q. When you speak of the line appearing to have been towed in the water some time before taken aboard the vessel, you are referring to its condition after the tow parted?

A. Well, the line was parted, and it was coiled on the aft part of the vessel; the aft part of the line was very badly frayed out.

Q. And when you say it was towed in the water, you mean it was towed in the water after the barge was lost?

A. After the barge was lost; I should say it was towed in the water about an hour or an hour and a half to be in that condition.

Q. That is a matter of surmise on your part, it is not?

A. No, sir, it is from experience. I have seen hawsers in the water. [94—23]

Q. Where did you have that experience?

A. On the coast, on this coast.

Q. Are you a seaman?

A. I have been around the water a great deal. I have not any papers. I have had a great deal of experience with vessels, and around vessels, and construction.

Q. In what way?

(Testimony of J. E. Davenport.)

A. In operating them, and as agent for them, and so forth.

Q. When you say operating, you mean operating them on land?

A. In wharf construction I have seen pieces of line overboard and threshing around in the surf and around in the water.

Q. But you have had no experience whatsoever on board ships with a vessel towing, of a towline dragging, or anything of that sort?

A. No, sir, I have not had any of that experience.

**[Testimony of A. F. Pillsbury, for Libellant.]**

A. F. PILLSBURY, called for Libellant, sworn.

Mr. DERBY.—Q. Captain, what is your occupation? A. Marine surveyor.

Q. How long have you been in that business?

A. More than 11 years.

Q. Are you also a master mariner? A. Yes, sir.

Q. Do you remember being employed by Mr. Rosenthal and Mr. Davenport to go up and attend to the salvage of the barge which was stranded, Captain? A. I do.

Q. When were you employed?

A. On the forenoon of Wednesday, the 10th of September.

Q. When did you go up?

A. I left on the steamer "Brunswick" the same afternoon.

Q. Was that the quickest way you would get there? **[95—24]**



(Testimony of A. F. Pillsbury.)

A. That was the best opportunity.

Q. After you got there what did you do, Captain?

A. First, I consulted with the wharf agent of the Union Lumber Company at Fort Bragg, where the "Brunswick" landed; Mr. Robeck, is the name of the superintendent, I think. I asked him what facilities there were there for pulling this barge off. It resulted in his going down to the wreck with me. I also learned from him that Captain Hammer was at Mendocino to take charge of the loading of a sailing vessel there. Captain Hammer, by the way, is a captain for the Union Lumber Company, a port captain, and has had charge of picking up moorings, not only for the Union Lumber Company but also for quite a number of other lumber companies that have outside landings; he has had a lot of experience on that coast. When I learned that he was in Mendocino, I got him on the telephone and asked him to come up and meet us at Caspar and look the situation over and see what arrangement could be made toward pulling her off.

Mr. FRANK.—Just a moment. I don't understand what this dissertation has to do with this case. They picked her up and repaired her, I suppose.

Mr. DERBY.—Q. Where did you find the barge?

A. I found the barge in a cove about three-quarters of a mile northwest of Caspar entrance.

Q. Was she on the rocks?

A. She was on the rocks.

Q. Was she damaged?      A. Yes, sir.

(Testimony of A. F. Pillsbury.)

Q. Did you arrange with the "Brunswick" to haul her off?

A. I did, or rather, I arranged with the Union Lumber Company, that they would send the "Brunswick."

Q. And was she hauled off by the "Brunswick"?

A. She was.

Q. Was there any other assistance available, Captain? [96—25]

A. I was not able to find any. I inquired of the manager of the Caspar Lumber Company, and he said they could not attend to it, that they had no facilities there for doing the work.

Q. What was the arrangement for salvage?

A. The arrangement was that for the sum of \$1000 the Union Lumber Company would undertake with their steamer "Brunswick" to tow the barge off and deliver her to San Francisco.

Q. Do you mean the Union Lumber Company or the National Steamship Company?

A. Well, they are pretty much the same, the National Steamship Company I suppose is the correct term. If they got the barge here safely they were to receive \$1000. If they made the attempt and either got the barge off or did not get her off, or got her off and lost her on the way down, they were to get \$200.

Q. Was that the best arrangement you could make, Captain?

A. That was the best arrangement I could make.



(Testimony of A. F. Pillsbury.)

Q. Did you consider it a reasonable arrangement?

A. Yes, under the circumstances.

Q. What were the circumstances?

A. The vessel was in a rocky cove. On the morning I got there there were heavy breakers outside, nearly 1000 feet out, through which it was dangerous at that time to send a boat, and she would have to be dragged off about 1000 feet before she would be in clear water.

Q. Did the "Brunswick" have to give up any other business in order to attend to the salvage?

A. She left Fort Bragg early in the morning and was down there about seven, I think she got back about noon of the same day.

Q. Was the barge subsequently towed by the "Brunswick" to San Francisco?

A. After the barge was floated she was towed into Fort Bragg, and waited until the "Brunswick" had completed [97—26] her cargo, and then was towed to San Francisco by the "Brunswick."

Q. Was the salvage and the towage in your opinion performed in the proper manner?

A. Yes, sir.

Q. With due care?      A. Yes.

Q. What happened to the barge after she reached San Francisco?

A. She was tied up at the seawall and Henry Peterson, the man for whom she was built, was notified to send a watchman and a light and look out for her, which he agreed to do.

Q. Did you see the barge later, in the repair yards,



(Testimony of A. F. Pillsbury.)

Captain?      A. Yes, sir.

Q. Did you make a survey?      A. I did.

Mr. FRANK.—Are we going into the question of damages? The testimony of the witness has been wholly to the point of damages.

Mr. DERBY.—I think not. I have only one more question.

Q. Captain, have you a chart with you?

A. I have. (Producing.)

Q. What is that chart?

A. A chart of the coast of California; from Cape Mendocino to Point Arena.

Q. Will you mark on that chart, Captain, a point twenty-five miles from Point Gorda and fourteen miles offshore.

Your Honor, that is where the master's report says the barge was lost.

Q. Have you fixed the point, Captain?

A. Yes, sir, I have marked it with a cross.

Q. Can you identify on that chart the point in latitude north 39-45, and longitude west 124-10? Will you mark that point A?

A. Which one, the first or the second?

Q. The second one.      A. All right.

Q. Captain, presuming the barge to have gone adrift at the point you have marked with a cross, at about 12:30 the night [98—27] before, would it be reasonable to expect her, at 8:00 A. M. in the morning to be at the point marked A?

A. Depending upon the weather.

(Testimony of A. F. Pillsbury.)

Q. Is that point in the usual fairway of vessels?

A. Yes, sir, I should think just about.

Q. Both going up and coming down the coast?

A. Yes, sir.

Mr. DERBY.—I offer the chart in evidence, and ask that it be marked “Libellants’ Exhibit B.” I have an “Exhibit A” already. That is all.

Cross-examination.

Mr. FRANK.—Q. Where is Fort Bragg?

A. Right here (pointing),

Q. Where is the cove in which you found the barge?

A. It is very hard to explain that here, there are so many coves there. It is about three-quarters of a mile up the coast from Caspar entract.

Q. Just mark that point B, please, where you found the barge.

A. I cannot say just exactly where it is.

Q. These lines you have drawn here are for the purpose of establishing the various points you have been asked about, are they not? A. I presume so.

Q. Didn’t you draw them? A. Yes.

Q. Then you know, don’t you? That is what you estimate to be the drift of that barge, A-B?

A. Yes.

Q. What distance is that; just measure it off on the chart?

A. About  $27\frac{3}{4}$  miles; that is, from A.

Q. Now measure the distance from the cross.

A. That is just slightly over 7 miles.

(Testimony of A. F. Pillsbury.)

Q. So it would be about 35 miles from that point to the point where you picked her up?

A. Yes, sir. [99—28]

Q. What date was it you picked her up, Captain?

A. Do you mean what date did I get to Fort Bragg?

Q. Oh, yes, that is so; you don't know how soon she came in there. A. No, sir.

Q. You had no means of finding out how soon she got in there?

A. I did ask, but I don't remember it, Mr. Frank.

Q. What date was it you got up there?

A. I got up there on Thursday morning, the 11th.

Q. When you found her in there, was she moored in any way?

A. No, sir. The men who first saw her saw her come in, I believe, on a calm day, and tried to moor her to one of the outlying rocks and the line parted and she came into this little cove or indentation.

Q. Did you meet those men? A. Yes.

Q. Did you ascertain *that* day that was?

A. I did.

Q. What day did they say they saw her coming in? A. My recollection is it was Monday.

Q. What date was that?

A. That would be the 8th.

Q. What day was that?

A. That would be Monday, I believe.

Q. And what year was it? A. 1913, last year.

Q. What did you say was the condition of the



(Testimony of A. F. Pillsbury.)

weather when you went in there with the "Brunswick"? A. I don't think I testified to it.

Q. You said something about breakers, did you?

A. I said the day I got there there were quite heavy breakers. The "Brunswick" did not get there until the next morning.

Q. How was it then, what was the condition then?

A. It was quite reasonably smooth then, so that they got in without any danger.

Q. They got in without any danger?

A. Yes. [100—29]

Q. How near could they go to the barge?

A. I think they went within 40 or 50 feet so that they could throw a heave line.

Q. So there was no difficulty in making fast to the barge, at all?

A. Not that day, not any great difficulty.

Q. How long were they towing on her to tow her out?

Mr. DERBY.—I submit that this bears on the question of damages, and not on the question of liability.

Mr. FRANK.—This gentleman was asked how much he paid, and whether it was a reasonable charge.

Mr. DERBY.—I only wanted to establish the general fact.

Mr. FRANK.—I would be only too glad to defer this, but while I am at it I think I had better finish it. I will say, though, that the captain will have to be called again on the question of damages.

(Testimony of A. F. Pillsbury.)

Mr. FRANK.—I will finish with this now, as long as the Captain started with it.

A. In getting her afloat, I think about an hour.

Q. After she was got afloat, where was she taken?

A. To Fort Bragg.

Q. Did they have any special difficulty in taking her?     A. No, sir.

Q. How did she ride on the water, was she water-logged?

A. She was filling all the time from the time she began to float that morning.

Q. Rapidly or otherwise?

A. Not very rapidly.

Q. Then she did not suffer very much damage on the rocks?

A. She suffered all her damage on the rocks.

Q. All the damage she suffered, but it was not very great, was it?

A. Yes, it was all the damage that was suffered by the barge.

Q. Did she have a hole in her?     A. Yes.

Q. Did she have compartments?

A. Yes, sir, she had compartments. [101—30]

Q. So that this hole was only in one compartment?

A. Yes.

Q. After they got her to Fort Bragg and they loaded the "Brunswick" and then took her in tow and towed her down here: Is that right?

A. Yes, sir.

Q. No difficulty in doing that?

A. Yes, some difficulty.

(Testimony of A. F. Pillsbury.)

Q. Were you on board?

A. I was on the "Brunswick."

Q. What was the difficulty?      A. Heavy seas.

Q. Is that all?      A. She broke adrift.

Q. She broke adrift, did she?      A. Yes, sir.

Q. Where did she break adrift?

A. The location?

Q. Yes; how long after she had started out?

A. She broke adrift the next morning, I think we were ten or fifteen miles northwest of Point Reyes.

Q. How long did it take to pick her up?

A. I should think two hours.

Q. What was the matter, did the line part?

A. The wire pennant parted.

Q. Where did it part?

A. I don't know just what particular part of the pennant parted.

Q. I mean, did it part next to the "Brunswick" or next to the tow, or in the center, or where?

A. The barge had a pennant leading from each corner—

Q. Oh, yes, I understand, you mean the bridle.

A. Yes, and this wire forming the bridle or pennant parted. The "Brunswick" furnished her own towing-line.

Q. One pennant parted and one pennant held, did it?

A. No, sir; it was one piece, as I remember, seized together, and first one side parted and then about an hour afterwards the other side parted. The barge



(Testimony of A. F. Pillsbury.)

had of course water-logged and [102—31] sheared heavily in the heavy swells running.

Q. It was a following sea, was it not, and a following wind? A. Yes.

Q. And about what force wind was it?

A. Between 8 and 9.

Q. How long had that continued?

A. The wind began to breeze up at sundown that night, and for a few hours it blew quite strong and in the morning it had moderated.

Q. That is the usual northwest wind that you expect in that season of the year along that coast, is it not?

A. You may expect it at any time, yes, sir.

Q. There was nothing extraordinary about it, was there? A. No, sir.

#### Redirect Examination.

Mr. DERBY.—Q. Did the wind make the towing any easier, Captain, a following wind?

A. A following wind makes it usually more difficult in towing anything.

Q. And I understand that the barge was water-logged? A. Yes, sir.

#### Recross-examination.

Mr. FRANK.—Q. If she had not been water-logged, she would have jumped about just the same or perhaps worse, would she not?

A. She would not have had the weight.

Q. She would not have had so much weight, but she would have had the whole weight of the barge,

(Testimony of A. F. Pillsbury.)

and she would have been livelier and would have jumped more?

A. I think not, because she would only weigh about one-third floating than she would water-logged.

Q. But leaving out the weight, she would have jumped about more *lively* than she did when she was deep-seated in the water, because she was water-logged?

A. No, I don't know that I agree with you there.

[103—32]

Mr. DERBY.—That is our case, if the Court please.

Mr. FRANK.—Now, if your Honor please, we will introduce in evidence the depositions of Mr. Falkenstein and Mr. Edgar Simpson. So that your Honor may have the benefit of that testimony in connection with the oral testimony introduced, I will read them.

Mr. DERBY.—I am perfectly willing to waive the reading of them.

Mr. FRANK.—I want to read them for my own purpose. (Reads.)

[Testimony of Hans Michaelsen, for Respondent.]

HANS MICHAELSEN, called for the Respondent, sworn.

Mr. FRANK.—Before I examine the Captain, if your Honor please, I want to call attention to the interrogatories attached to the libel and the answers thereto.

(Testimony of Hans Michaelsen.)

Mr. DERBY.—Are you offering these as evidence, Mr. Frank?

Mr. FRANK.—Certainly I am.

Mr. DERBY.—I submit, if your Honor please, that while I can use the answers to the interrogatories, he cannot. They are self-serving declarations so far as he is concerned.

Mr. FRANK.—They are not self-serving declarations, any more than when you ask him certain questions on the witness-stand, you might say that his answers are self-serving.

Mr. DERBY.—I submit that they are inadmissible on the part of the respondent. I have no objection to Mr. Frank reading these to the court, but he is not entitled to offer them in evidence.

Mr. FRANK.—I know that the question is controverted, if your Honor please, but I do not think it is settled that they cannot be used, and in principle I do not see why they cannot be used.

The COURT.—Except on the ground that they are self-serving [104—33] declarations.

Mr. FRANK.—They are answers to questions asked by the libellant.

The COURT.—But he is not under oath.

Mr. DERBY.—They are really answered by Messrs. Frank and Frank, and they are not under oath.

The COURT.—I do not think it is necessary to answer them under oath. On principle it seems to me they are admissible, perhaps, against the man who makes them.



(Testimony of Hans Michaelsen.)

Mr. FRANK.—They are under oath, because they are a part of the answer; they would be of no value if they were not under oath. The answer is verified.

Mr. DERBY.—I have no objection to Mr. Frank reading them, but I certainly object to their being offered in evidence.

Mr. FRANK.—Well, we can discuss the matter afterwards. I take the position that I offer them as evidence.

The COURT.—My impression is they are not admissible in your favor.

Mr. FRANK.—Does your Honor wish to make a ruling on that point?

The COURT.—No, I do not want to foreclose you. You can read them and if they are admissible you will have them in the record.

Mr. FRANK.—Very well, your Honor. (Reads.)  
[105—34]

Q. Captain, what is your name?

A. Hans Michaelsen.

Q. You were master of the “Hardy” at the time in question, were you not? A. Yes, sir.

Q. Before you took the tow, what, if any, conversations did you have with Mr. Banks upon the subject?

A. Mr. Banks was to furnish everything, tow-lines and lights and everything.

Q. Just give the conversation, so far as you can remember it, that led up to that conclusion or agreement that you speak of; how did he approach you, what did he do and say, and what did you do and say?

(Testimony of Hans Michaelsen.)

A. Well, the first we spoke of it was about three trips before; we made three trips I think while he was building the barge. He asked me how much I would charge him for towing down two barges, and at that time I told him I did not know for sure how much I would charge, and I said I would let him know later. I saw Mr. Banks up there every trip I was up there, and the following trip I told Mr. Banks that if he would furnish everything, I would tow them down for \$600. Mr. Banks told me that was too much, he thought that was too much. Well, I told him, "I don't care, because I am going to no trouble to get a tow-line, because I am not in the towing business, and I have got no tow-line." So he said he could get a tow-line from Mr. Simpson—Mr. Banks did. We verbally agreed that I would tow the two barges, either take two or the one, and I said to Mr. Banks, "We will charge \$500, you can count \$300 for the first one and \$200 for the small one, or else \$250 apiece to tow them down," and he was to furnish the tow-line, to get the tow-line from Simpson and furnish the lights and everything. [106—35]

Q. What, if anything, was said about who should take the risk of the tow?

A. I told Mr. Banks that I would take no chances or no risks on that towing. I told him I would do my best and try to get it down, but I would take no risk on it.

Q. After that conversation, what, if any, reply did he make to those suggestions of yours?



(Testimony of Hans Michaelsen.)

A. He said it will be all right, "I will pay you that, and it will be all right, so you tow the barges down then." And so I said "All right," and we let it go at that.

Q. Did you have any subsequent conversation with Mr. Edgar Simpson about that tow-line?

A. When I came up I met Edgar Simpson on the same trip that I was going to tow it down, and I said to Edgar, I asked Edgar Simpson, "Are there going to be any charges against me on that tow-line for Kruse and Banks, and he said "No, if there is anything to be charged it will be up against the shipyard of Kruse and Banks," and I said "All right, that is all I want to know, because I have nothing to do with the tow-line."

Q. And then did you take the tow-line?

A. I went down and took the tow-line and put it on the steamer "Hardy."

Q. After you had been loaded, and were ready to go to sea, who made the tow fast?

A. Two men from the Kruse & Banks yard and Mr. Kruse was superintending the work with the help of some of my crew; they connected the hawser to the bridle. The bridle was all completed, and the light was lighted when I came down there, and the barge was lying alongside of the wharf.

Q. After you had started down and got on the bar, what, if anything, happened?

A. The light went out when we were crossing the bar, on the outer edge of the bar. [107—36]

Q. On the outer edge of the bar? A. Yes.



(Testimony of Hans Michaelson.)

Q. When you arrived at that point, could you have turned around and gone back into the inner bay?

A. No, sir.

Q. Why not?      A. We would lose the ship.

Q. Detail the reasons why?

A. The tide was just commencing to ebb already and there was just enough water for me to get out on top high water; against an ebb tide, I could not get in with that ship, I would hammer the bottom out of it. I could feel the bottom of the bar as I went out, once I felt the bottom.

Q. In other words, it is a shallow bar, and just enough to carry you over with top high water?

A. Yes, sir.

Q. And it would not have been safe for you to return at that time?

Mr. DERBY.—I submit, Mr. Frank, that you should not lead the witness.

Mr. FRANK.—I am not. I am simply repeating what he said.

Q. What time of day was that, Captain?

A. We crossed the bar at six o'clock, about six or six fifteen.

Q. And how was it with reference to growing darkness or otherwise?      A. What is that?

Q. How was it with reference to daylight?

A. It was just getting dark when I got to the whistling-buoy. I was clear outside about a few minutes to seven, and it was setting in dark.

Q. Why did you not at that time launch a boat and relight the light?

(Testimony of Hans Michaelson.)

A. Well, the wind was too swift and the sea was too strong and night-time was setting in, it was getting dark. By the time I got clear offshore in safety with my vessel, it was dark, and it was not fit to lower a boat to board that barge, it was not fit to board the barge in safety.

Q. Generally, whether it was dark or daylight, what would be the danger of attempting to board that barge with the sea running? [108—37]

A. Well, there would be the danger of drowning some of the boatmen.

Q. Explain in detail, if you can, how the barge acts on the sea, with a small boat coming alongside of her?

A. It is a flush-bottom barge, and with a strong northwest sea running, it will come up on top of one sea and it will roll over and set right down; if you are down in the sea, she is liable to roll half way over you and list over you; she was flush, and if she hits you you go out, there is nothing to hold fast to. There is no chance at all. She would smash a little boat up and drown the men. They would be in danger. In my judgment, I would not put any man out to face that barge in that way, and I didn't think I should try to drown any of the men to get a light on the barge.

Q. Was there anybody on the barge to receive a line, or anything of that sort?

A. No, sir, nobody was on the barge.

Q. What were the conditions the following day: Did you go through the next day?



(Testimony of Hans Michaelsen.)

A. Yes, we went all day.

The wind was increasing as we came along, and the sea was increasing; there was a strong northwest wind and sea.

Q. You heard what Mr. Rosenthal and Mr. Davenport had to say about what you said to them concerning the light?

A. Yes, I heard what they said.

Q. What, if anything, have you to say about that testimony and that conversation?

A. I told Mr. Davenport that the weather did not permit me to relight the light, that was why I did not have it lit. Mr. Davenport knows very well I told him so. The mate and the chief engineer stood on the poop when I told Mr. Rosenthal the same thing, that the weather did not permit us to relight the light. If I had any chance to re-light her, I would certainly have re-lit her in safety to myself, but I did not want to drown anybody to re-light the light; I would not permit [109—38] anybody to do that.

Q. Now, Captain, on the way down, what if any watch did you have set on that barge?

A. As usual; we had the usual men, besides an extra man on the poop looking out for the tow, especially as we had no light. I left orders to the men on the bridge to blow a danger whistle if anything approached us from the stern, and in addition I hung up an anchor-light, or what we call a riding-light, on the main boomaloft to attract attention to keep away. That is the next best thing we could do under the cir-



(Testimony of Hans Michaelsen.)

cumstances, because I could not get a chance to get to the barge.

Q. This poop-deck that you speak of, where you had a watch on the barge, that is on the stern of the vessel, is it?     A. Yes, sir.

Q. And besides that you had your regular watch on the ship?     A. Yes, sir.

Q. Was there a watch on that poop at the time that you lost her?     A. Yes.

Q. I presume you were not on deck at that time, were you?

A. I went below at ten o'clock. I went to bed at ten o'clock at night, and left my order as usual, to keep a good lookout for the tow and the ship and the steering, and to let me know if anything occurred.

Q. The first you knew of it was when a report was brought to you?

A. The first report I got, was at twelve o'clock; the second officer reported at twelve o'clock that everything was fine, that the sea and wind were about the same, and that the tow was there, and everything was O. K. At 12:40 the first mate came and called me and said that we had lost the tow. It was a very dark and cloudy night. He was looking for a few minutes, between [110—39] him and the man that was aft looking out; he said he was looking for a couple of minutes, he felt sure that there was no barge behind us, because he could not see the foam, and he came right and called me, and he said he felt satisfied we lost the tow.

Q. What did you do then?

(Testimony of Hans Michaelson.)

A. I got right up on deck. I was up on the bridge in five minutes. When he called me, I ordered him to call all hands out and get the hawser in. When I came up the crew was aft getting ready to get the hawser in. I slowed my vessel down to half speed until we got the hawser in, so that there was no danger of getting it in my wheel. I hove the ship around; we could not get around rapidly as there was a heavy sea running. I headed her in one point inside the regular course and lay in to the northward until daylight, and figured on going northward and then coming south, and expected to get her in the morning when daylight set in. But when daylight set in it was foggy.

Q. What did you do?

A. I kept on under slow bell, out and in about a point, searching; all were on watch. I was up in the rigging with the glasses looking around, and we were all watching and looking, trying to discover the barge, but we were not able to pick her up on account of the fog.

Q. How long did you keep that up?

A. Kept that up until 11:15.

Q. That is, the next day?

A. That would be the same day.

Q. As I understand it, Captain, the report came to you a little after twelve o'clock midnight and you kept searching for her until eleven o'clock, near noon on the same day, as you call the time according to sea time? A. Yes, sir.

Q. Did you sight any vessels during the time you



(Testimony of Hans Michaelson.)

were making this search?

A. I sighted what we thought was the nearest we could see in the haze—we thought it was the steamer “Watson.” [111—40]

Q. At the time you sighted her, what was the condition of the atmosphere?

A. At the time I sighted her it was hazy. I could see then about two miles. I judge I could see about two miles.

Q. What direction was she from you?

A. She was on my port quarter. She was, I should judge, about one mile inshore of me and about a mile and a half or two miles astern of me, on my port quarter.

Q. Did you make any effort to attract her attention?

A. No, she was too far, I could not reach her. My whistle she could not hear, and she was speedier than my vessel, and I had no way of reaching her, and so I didn't make any attempt.

Q. After that, what did you do?

A. We were keeping on searching. We saw her, I think, at about 8:30.

Q. Before we leave this other subject, Captain, what is the difference in seeing a vessel like the “Watson” at sea and seeing a barge the kind that you had in tow at sea?

A. It is harder to see the barge; she lays in between the swells; she had about four or five feet, about five feet, perhaps, free-board. A little distance from you in the sea she would be very hard to



(Testimony of Hans Michaelsen.)

pick up. Sometimes you will only see the masts of a vessel, and you will not see the hull at all; sometimes you can see the upper works, and you can hardly distinguish at all what vessel she is.

Q. What kind of upper works did the "Watson" have with reference to color?

A. She had white painted houses. The "Watson" was about a mile inside of me, I should judge, when she passed. I saw the whole side of the vessel I guess only for about five minutes, and then she was out of sight.

Q. Did you meet any other vessels coming down?

A. In the evening off Point Arena, I met the steamer "Beaver." [112—41]

Q. Did you communicate with her?

A. I hailed the steamer "Beaver" with my whistle, and asked him to flash a wireless to notify steamers of the barge that was adrift with no light on and maybe she was a menace to navigation, and I asked him to notify the owners in San Francisco.

Q. Why was it, Captain, you ceased searching for her at eleven o'clock the next day?

A. I gave up searching to feel satisfied of bringing my vessel into port with the balance of my fuel oil, that is, without any danger or any salvage on the vessel.

Q. When you got into port, did you sound to ascertain what fuel oil you had?

A. I had just about twenty barrels, twenty-one or twenty barrels.

Q. So far as available oil for navigation is con-

(Testimony of Hans Michaelsen.)

cerned, Captain, how much of that was available; that is, how far does the pump go down, how far will it suck?

A. I never had less than 30 barrels coming into port, twenty-five or thirty barrels is the nearest I have been to the bottom of the tanks since I got the ship, and I judge you could use some more of that, I judge you could pump down to about five barrels in the tanks.

Q. That would leave you about fifteen barrels?

A. Yes, sir.

Q. In your judgment, would it be safe to take any chances out at sea in coming in with a margin less than that?     A. No, sir.

Q. You heard what Mr. Davenport said about his conversation with you upon the subject of fuel oil when he asked you about it and you said that part is all right, we had oil enough?

A. Mr. Davenport did not ask me about what fuel oil I had after losing the barge coming in. He said, "Well," he said, "how should you be short of fuel oil, if you had the barge in tow you would have been short of fuel oil"; then I said, "No, that would be all right, because I had spent ten or eleven hours cruising [113—42] about searching for her and that that used up some of the oil, and at eleven o'clock it was foggy, and if I had to search more I would have to go north again, and then I would have to come back, and I didn't have fuel oil enough to keep on searching for the barge any longer." I told him

(Testimony of Hans Michaelson.)

it would have been all right if I did not lose the barge.

The COURT.—Gentlemen, we will meet at two o'clock. [114—42½]

#### AFTERNOON SESSION.

HANS MICHAELSEN, recalled.

Mr. FRANK.—You may take the witness, Mr. Derby.

#### Cross-examination.

Mr. DERBY.—Q. Captain, did you have any experience in towing before you made this trip?

A. Yes, sir.

Q. How much experience?

A. I had experience towing on the government tug "Slocum" for six months.

Q. Had you ever towed barges before?

A. No, sir.

Q. Whene was it you told Mr. Banks that you would take no risks, as you put it?

A. I told Mr. Banks right outside of the office of the Simpson Lumber Company's office up at the mill. We stood right outside the office, the two of us, and talked the thing over.

Q. When was this?

A. I did not note down the date, because we had nothing in writing, but I think it was the trip before I towed the barge.

Q. Was it before or after you made your contract with him?

A. That was at the same time that we agreed; I



(Testimony of Hans Michaelsen.)

think, I am sure it was the trip before that we made the agreement, and that is the time I told Mr. Banks to understand that I was to take no risk at all.

Q. That is, you told Mr. Banks he was to understand that you were to take no risks at all?

A. Yes, sir.

Q. Is that the exact language you used?

A. Yes, sir.

Q. You are sure that was the exact language?

A. Yes, sir.

Q. When you went up there again after the trip with the barge, you asked Captain Simpson if he was going to charge you for the [115—43] tow-line?

A. Yes, sir.

Q. Why did you ask him that?

A. Because he said he was going to get the line, and I wanted to make sure there would be no charges against me, because I was making the price as low as I possibly could to Mr. Banks, because he was furnishing everything.

Q. What did Mr. Simpson have to do with it?

A. Because I promised Mr. Banks I would go down and get the line for him.

Q. You say it was agreed between you and Mr. Banks that he was to furnish the line. I don't see why you had the conversation with Captain Simpson if you were not to pay for the line; that was settled, was it not?

A. Well, my object was to make sure there were to be no charges made against me because I had nothing

(Testimony of Hans Michaelsen.)

written with Mr. Banks, and I was going to make sure.

Q. Didn't you tell Captain Simpson at the time you ordered the line that Kruse & Banks were going to pay for it?

A. I didn't say to Mr. Simpson that anybody was going to pay for it, that Mr. Banks was going to pay for it, no; I didn't know about the arrangement Mr. Banks made with Mr. Simpson. Mr. Banks didn't say to me what arrangements he made with Simpson, we didn't talk about that.

Q. What did you say to Mr. Simpson?

A. I saw Mr. Simpson before I went to get the line.

Q. What did you say to him then?

A. If there was going to be any charges against me for this line, Mr. Simpson.

Q. You say that was at the time you got the line?

A. Before I went down and got the line. When I came in I was up at North Bend.

Q. What did you want to ask him for again after you lost the barge?

A. No, that was before I lost the barge; that was before I got the line. I didn't ask him anything about it afterwards, it was [116—44] before I got the line when I asked him.

Q. Didn't you testify on direct examination that on the trip subsequent to your losing the barge you asked him if you had to pay for the line?

A. Before I took the line.

(Testimony of Hans Michaelson.)

Q. Didn't you testify on direct examination that after you lost the barge you had a talk with Captain Simpson and you asked him whether you had to pay for the line?

A. No, sir, I did not ask Mr. Simpson.

Q. And if Captain Simpson testified to that himself, that is incorrect, is it?

Mr. FRANK.—I don't understand, Mr. Derby, that either this captain or Captain Simpson so testified. There is no such testimony.

Mr. DERBY.—That is my understanding of it.

Mr. FRANK.—Well, the record will straighten that out.

Mr. DERBY.—Q. When you got this rope, didn't you examine it to see whether it was a good rope?

A. I was right there with the sailors when we coiled it up and brought it from the office down to the ship, I was right there.

Q. Didn't you examine the rope to see whether it was a good one?

A. As we coiled it up, we could see every part of it, and it looked satisfactory to me to tow that barge; in my mind it looked good enough to do that towing.

Q. Did you know that rope was an old rope?

A. I knew the rope had been used, but I did not know how much it was used.

Q. You were satisfied it was a perfectly good rope for that tow?      A. Yes, sir.

Q. Now, Captain, what time did you start out on your voyage?



(Testimony of Hans Michaelson.)

A. At five o'clock P. M. on September 5th, with the barge in tow.

Q. And the light went out at 6:15 P. M.?

A. About 6:15 P. M., [117—45] just as we crossed on the outer edge of the bar.

Q. How much speed did the "Hardy" make on that voyage with the barge, how many knots per hour?

A. She averaged about seven and three-quarters, between seven and three-quarters and eight.

Q. With the barge in tow?

A. With the barge in tow.

Q. How does she run without the barge?

A. About eight and three-quarters or nine miles an hour, that is, with steaming. If I have a fresh wind like I had, a strong northwest wind, generally I have the sails on and sometimes she makes nine and a half to ten with the wind.

Q. There is only that little difference between her going alone and going with the tow?

A. Yes, there was only that difference with the tow.

Q. Now, Captain, you go slower inside Coos Bay, do you not, than you go outside?

A. Sometimes I do it is according to the tide. I have to cross the bar at high water. That is the government rules and regulations. I must get out on high water. Sometimes we hurry up.

Q. Don't you have to be careful about the shoals there?

(Testimony of Hans Michaelsen.)

A. Well, I am acquainted with that channel pretty well. I have a pilot's license for that channel. I have been running there two years, and I know it pretty well.

Q. How long did it take to run out on this last voyage?

A. From the Portland Mill to the bar it took about an hour and five minutes.

Q. I am speaking of this very last voyage that you made. You arrived in San Francisco on Sunday, did you not?

A. Oh, you are speaking about the last voyage?

Q. Yes. How long did it take you on the last voyage to go out?

A. I got down the bay, this time it took me—it is different [118—46] time, sometimes I take an hour and three-quarters, sometimes an hour and a half, sometimes an hour. Sometimes I go down with the beginning of the flood, sometimes I come down half speed to get ready to correspond with the tide on the bar.

Q. Don't you always go down at half speed?

A. No. Sometimes I go down the flats there, if there is nothing in the way, I go down at full speed.

Q. You think it is a prudent thing to go down Coos Bay at full speed, you think that is a prudent thing to do? A. Yes.

Q. Now tell me how long it took you this last time to go down?

A. Well, I don't remember exactly; I could tell if I had the log-book with me.

(Testimony of Hans Michaelsen.)

Q. It took you about an hour and three-quarters, did it not?

A. About an hour and a half, I should think, this time.

Q. Is this your log, Captain (handing)?

A. Yes.

Q. Do you keep that yourself?

A. No, the officer writes that down on the bridge; I keep no log-book.

Q. How is the sea outside the bar that night, Captain?

A. Well, the sea was moderate when we first came out.

Q. Didn't it continue moderate up to midnight?

A. It was increasing, the sea and the wind increased.

Q. Did it not continue moderate up to midnight?

A. No, it did not continue exactly moderate, because the wind and sea increased as I came out.

Q. You have it entered in your log as moderate sea up to midnight, have you not?

A. It might be entered that way, I don't know. It says, "moderate sea at eight o'clock P. M."

Q. And also at ten and also at eleven and also at twelve?

A. It says "moderate" there, but nothing more about it.

Q. Haven't you ditto marks under "moderate" down to twelve [119—47] o'clock; is not that right? A. They have those marks there, yes.



(Testimony of Hans Michaelsen.)

Q. How was the wind outside that night?

A. Fresh northwest wind.

Q. A moderate wind?

A. Rather fresh; not what you call moderate; it was rather a fresh northwest wind.

Q. It was not heavy?

A. I don't know exactly which way you call it, but it was a fresh northwest wind.

Q. You say it was clear outside until a few minutes of seven?

A. It was clear; the weather was clear outside; the weather was clear all night.

Q. You could see the barge towing behind you all night, could you not?

A. We saw the barge behind.

Q. But you didn't let down a boat to re-light the light on the barge?

A. No; I judged the sea a little heavy and the wind a little too strong to lay around at night-time and try to put men out in the night-time and try to get around that barge. That was the way it appeared to me that night as far as I could see. The way the wind and the sea appeared to me, it was not proper at all to try and get any men to go in a small boat and try to board the barge in the middle of the night in the dark, because it was a dark night.

Q. You had a good working boat, did you not?

A. Yes, I had a good working boat.

Q. Could you not have gone under the lee of the barge in perfect safety?

A. The lee of the barge is just as bad as the

(Testimony of Hans Michaelsen.)

weather side of the barge. There is no keel on this barge. It is not like a vessel. I feel satisfied I could lower a boat on my own vessel and come around to a deep sea vessel, that is, if there were men around who could assist us with a line. But that night when we had to go alongside the barge and get ahold of it [120—48] with your hands, and if you got hold like that you would slip off and if you did that and came up on one of the seas and if you happened to come up on the sea, you would knock over the boat; it does not take much to break over a little row-boat or capsize it.

Q. Your men could all swim, could they not?

A. I never examined them as to that. I am not going to try and risk the men to be swamped out of the boat, because then I am up against the government myself. I am not supposed to go that far. I am supposed to use a sound judgment in those cases. And when it goes that far that those men have to go out and swim, then I am risking their lives, and I am taking chances either that they will drown or make it. They are human beings, you know.

Q. As a matter of fact, you were going along pretty easy with the tow, and you were not worrying much about not having the light, were you?

A. Well, it did not exactly worry me a great deal. I could not go out there, and I felt kind of satisfied the tow was in good condition the way she looked to me.

Q. You were going along perfectly smoothly?

A. No, I could not go perfectly smoothly with a



(Testimony of Hans Michaelson.)

sea and the wind running behind me. I was running on the sea and the barge was running on the sea.

Q. Was the water washing up on the barge?

A. I could not exactly say whether it was the first night; during the night it is very hard to tell.

Q. How was the weather the next day?

A. The next day the wind was very strong, strong northwest wind and big sea; the sea and the wind increased.

Q. Look at this entry.

Mr. FRANK.—I want to suggest to you, Mr. Derby, that you [121—49] did not read that other entry right.

Mr. DERBY.—Oh, yes, I did.

Mr. FRANK.—No, you were mistaken about it.

Mr. DERBY.—We will go into that later; I want to continue my examination.

Q. Is there anything in this log about there being a heavy sea on September 6th?

A. It says, "Northwest wind and clear," on this page.

Q. Is there anything about a heavy sea?

A. It made no remark about the sea, but I say there was a big sea, and a northwest wind. When the wind is blowing, there must be a sea. Of course, I admit they should have put a remark down there about it.

Q. Could you not have let down a boat at any time on that day to have re-lit that light?

A. No, sir; any time that I saw an opportunity—

Mr. FRANK.—(Intg.) One moment, Captain. I



(Testimony of Hans Michaelsen.)

make an objection to this because I think that line of examination has gone far enough inasmuch as it is proceeding upon a wrong assumption. In this case, it is a question of ordinary care, only. Even if he could have let a boat down on that subsequent day, he is not bound to do so if in his judgment as a shipmaster it would not have been an ordinarily safe matter to do. There is such a thing as doing things that are not proper to be done under the circumstances.

Mr. DERBY.—I submit that if a boat could possibly have been launched to re-light that light it would have been gross negligence to go ahead with that tow without any light on it during the whole of the next night. I submit that the evidence is clearly admissible.

The COURT.—But what bearing has the failure of lighting on [122—50] the case? Has it a bearing on the time they discovered the loss of the tow?

Mr. DERBY.—That is exactly it, your Honor. If she had a light, it certainly would have been discovered by the “Hardy” sooner than it was.

The COURT.—It may be gross negligence to tow a barge without a light so far as the relations of this ship and this tow with other vessels plying up and down the coast were concerned, but what would be gross negligence as against other vessels might not be at all such as regards the safety of the tow itself and the peril that afterwards befell it.

Mr. DERBY.—I submit that it would be, your Honor, for the reason it was one of the precautions

(Testimony of Hans Michaelson.)

for the saving of this tow, I mean one of the precautions that should have been taken. Hawsers often break on tows; there is no question about that.

The COURT.—I understand that, but do you mean it would be grossly negligent not to put a light on the barge, no matter what the danger attending it might have been?

Mr. DERBY.—Not if it was impossible.

The COURT.—I mean if it was attended by great difficulty and extreme danger.

Mr. DERBY.—If it was attended by great difficulty and extreme danger, I say it was not his duty, but I am trying to show that in this case it was not attended by great difficulty or extreme danger.

The COURT.—The question will be permitted. I gathered from something the captain said it was possible to see this tow so long as it was there by the foam that it threw up in front of it.

Mr. FRANK.—That is the fact, your Honor.  
[123—51]

Mr. DERBY.—I am coming to that in a minute or two, your Honor.

Q. You considered that it was too rough during the whole of that day to put down your working boat?

A. Yes, sir.

Q. Do you remember the report you made to the Collector of Customs, Captain, after getting in?

A. I could not tell it word by word. I made it up in a letter.

Q. Did you say anything in your report at all



(Testimony of Hans Michaelsen.)

about having encountered any rough weather on the voyage?

Mr. FRANK.—Show him the report, Mr. Derby, if you have it.

Mr. DERBY.—Very well, I will show it to him.

Mr. FRANK.—The report speaks for itself.

Mr. DERBY.—Q. Captain, here is a copy of the report. (Handing.)

A. Well, I can't see nothing wrong with that report. The law required me to make a report.

Q. You were seeking in that report, were you not, to exonerate yourself from any blame for the loss of the barge?

A. Well, I could not exonerate myself. That would be up to the United States Inspectors to say. I am required to make a report as to just how it happened. That is the way I lost the barge, and I didn't find it. That is why I am supposed to report. If I put too much down there and wanted to exonerate myself, they would want to know what right I had to do that.

Q. During the night you lost the barge, could you see or through the night did you see the foam thrown up?

A. Yes, I saw the barge myself after ten o'clock when I went below.

Q. You say you could see the foam? A. Yes.

The COURT.—Q. Did you say you could see the foam or the barge itself?

A. Yes, I could see the foam and the barge itself.



(Testimony of Hans Michaelson.)

Mr. DERBY.—Q. You say the weather was clear?

A. Yes, dark but clear. It was that way when I went below at ten o'clock.

Q. Did not the weather continue clear up to the time you lost the barge?

A. I could not tell when I was in bed.

Q. Wasn't the weather clear when you got up?

A. It was dark and cloudy when I got up, it was a very dark night, a strong wind and quite a sea running.

Q. You at once hove in the rope, did you not?

A. Yes, we hove in the rope. That was the first proceeding I had to do, to, get the rope away from the propeller.

Q. In what condition did you find the rope?

A. Well, it was naturally as a rope would be when it was heaving through the water; it must have been I suppose ten minutes from the time I got up to the time I got it in—about fifteen or twenty minutes to get it secured and get it in.

Q. How long was the tow-line?

A. I don't know.

Q. How long was the part of the tow-line that you got in? A. I don't know, I never measured it.

Q. Was it more than 300 feet?

A. 300 feet, yes; I had about 600 feet of line out.

Q. You mean to say that it took you twenty minutes to get 300 feet of line in?

A. On a ten-inch hawser, yes; I call that good work at night-time, working with the capstan.

Q. How did you haul it in?

(Testimony of Hans Michaelsen.)

A. We had to heave it in with the capstan. I call that good work at that time of night, getting the men out of the bunks and to work.

Q. What lights did you have that night?

A. I had the regular running-light, the two mast lights, and the tow-light.

Q. How far could you see with that light on that night?

A. I don't understand the question. [125—53]

Q. How far off could you see? How far off could you see objects on that night?

A. How far off could I see lights on that night, do you mean?

Q. How far off could you see objects?

A. I did not see anything but the sea and wind.

Q. How far off did you see objects?

A. It is pretty hard to say how far I could see on a night like that. We didn't have no lights to see but our own light. Sometimes you imagine you can see five, or six, or seven miles, and you only see two miles. Sometimes you imagine you can only see two miles and you can see five. I would not say how far off I could see. I am not sure of it.

Q. How far off could you see lights?

A. Mast-lights are supposed by the Government laws to be seen five miles. Whether I could see it five miles or not, I don't know.

Q. Captain, what was in this log before this erasure was made, 12:40?

A. This entry here is practically just the same, it means just the same as it is in the official log-book,

(Testimony of Hans Michaelson.)

only it makes it a little shorter to put this in behind. They left out that we turned around.

Q. They left it out, that you turned around?

A. Yes, sir; left it out in here, but it is in the official log-book.

Q. When were these entries made?

A. All entries are made when you do the work, When you finish with the proceedings, you enter it in the log-book, passing land, or changing your course, or anything like that.

Q. Who made that erasure, who rubbed that out there? A. This here, I rubbed out myself.

Q. Why did you rub it out?

A. To put this in here, as the mate was not there; I did it here; that belongs to it. [126—54]

Mr. FRANK.—Q. Just read what you put in, Captain, so the Court will understand what the change is.

A. Tow-line parted, the ship was hove to at once.

Mr. DERBY.—Q. What was put in before you made the erasure?

A. Tow-line carried away, I guess. The ship was hove to, because the mate can witness it. It was his duty to put it in there. This is what we call a scratch-book.

Q. When did you rub out what was there before?

A. I don't recollect the day, but I guess it was that day coming down. I think the mate was on the watch below.

Q. You mean the next day after this you rubbed this out, and entered it correctly?



(Testimony of Hans Michaelsen.)

A. Yes, I entered it correctly. The mate, I think, was on his watch below, and I didn't call him. He has it in his official log-book.

Q. Did you say, Captain, that immediately on discovering the loss of the barge you hove to, you turned your vessel around?

A. I told you I was in bed at the time we lost the barge.

Q. I mean when you got up on deck. You came up on deck in about five minutes?

A. In about five minutes, yes; I did not exactly time it, but it was about five minutes.

Q. Then you had the boat turned around?

A. I had to get the hawser in first; if I got the rope in the propeller, I was gone myself, I would be under salvage myself, I had to get the hawser in first.

Q. As a matter of fact, Captain, are you sure you turned around at all?

A. Am I sure I turned around?

Q. Yes.

A. Well, I guess I am; I guess I am sure I turned around, yes.

Q. Didn't you proceed ahead for a considerable time because you found you could not turn around because of the height of your [127—55] deck load? A. No, sir.

Q. Are you sure of that?

A. Yes, sir. My log-book shows I turned around; it is entered by the officer on the bridge. The man at the wheel will know it, too. He got his order to turn it around.

(Testimony of Hans Michaelson.)

Q. What did you do?

A. We slowed her down.

Q. How did you proceed?

A. I steered northwest by north, I think, one point inside the regular course going up the coast, because I figured the barge would drift in.

Q. You proceeded in a northerly direction?

A. Yes; that was the only way to do.

Q. There was a northwest wind, was there not?

A. Yes, sir.

Q. The barge would be drifting down, would it not, in a southerly direction?

A. Yes, sir; the barge would be drifting in a southeasterly direction.

Q. What was your purpose in proceeding north?

A. That was the only way I could hold my ship; I didn't want to run it to the southward.

Q. How far did you run that way?

A. I run until daylight. There was no use searching at night for a barge without a light.

Q. You were going dead slow, then, during the night, were you?     A. Yes, sir.

Q. You could not burn much fuel oil during that time could you, if you were going dead slow?

A. Well, there was a strong wind. She was going I guess half speed down there. We were making slow headway with the ship. I did not exactly ask the chief how much she registered down there, but she was going near to half speed to hold the steerage way on her. I had to have enough headway to hold

(Testimony of Hans Michaelson.)

steerage way on account of the wind and sea which were quite strong. [128—56]

Q. Then the entry in the log that you were going first dead slow and then slow speed is incorrect; you were going half speed.

A. Well, we were going slow speed, a little half speed. We have no telegraph there, you know, we just have a bell. When I want half speed I give one bell; then if we want anything less than that I whistle down to slow her down more.

Q. Did you proceed in a northerly direction up until daylight? Were you constantly proceeding north up until daylight?

A. I was proceeding northwest by north until about daylight.

Q. When was daylight?

A. Daylight comes in in the morning then; you can see a little ways around six o'clock.

Q. You did not begin any searching for the barge until six o'clock, did you?

A. We had a lookout, but I didn't expect to see her. I didn't want to see her that night, because at night I would collide with her; she was heavy enough to break something on my vessel. There was no light on the barge, and it was a dark night, and it was not safe for me to come in contact with the barge with a strong wind and a sea; it was not safe for me.

Q. What did you do in the daylight?

A. I ran in the night more than the distance from when we lost the barge, and I turned around on a



(Testimony of Hans Michaelsen.)

slow bell and ran to the south and southeasterly and kept looking around. I changed my course in for a little while, and then I steered out a little while and tried to see if I could pick it up. There was a kind of a drifting fog. At times it was a little clear and I could see perhaps a couple of miles and then it would shut down again and you could not see anywhere.

Q. In your report to the collector of customs, you say the fog lifted and you continued to search for the barge until eleven A. M. the same day.

A. That is correct; at eight A. M. [129—57] the fog lifted, and it lifted for perhaps half an hour. It was a drift fog. Then it set in foggy again. When the fog lifted I saw the steamer; I thought it was the "Watson"; I could not see her ahead of me, it was then foggy; it took her about fifteen minutes to come from a mile ahead or a mile and a half ahead until she got about a mile and a half astern. I could not see her a mile ahead on account of the fog. After she passed me about two miles or so I saw her, and I saw her for about five minutes, then it set in again. There was a drift fog that generally runs with a northwester.

Q. I see the first note of any fog in this log is 9:10 A. M., and there is another note of it being foggy at 10:00 A. M., and clear at 11:15 A. M.

A. It was a drift fog; it is foggy and it is clearing; that is what a drift fog is. Fog banks come with a northwest wind. At times it is pretty clear and

(Testimony of Hans Michaelsen.)

you can see a little ways and at other times it sets in foggy again.

Q. Did it begin to clear at 11:15 A. M. as noted in the log?

A. At 11:15 A. M. it was clearing, that is, you could not call it clear, but it is what we would call clear enough that we did not have to blow our steam whistle.

Q. It was cleared up?

A. It was clear enough so that we did not have to blow our steam whistle. We could see for a mile or two around us.

Q. That was the very time you started back to San Francisco was it not?      A. That was the very time.

Q. Suppose when it was foggy you hove to and waited, you could have saved fuel oil in that way, could you not?

A. Well, I could not lay on the ocean with a north-west sea and wind without using my engine. [130—58]

Q. You could have gone very slowly.

A. I would not do it as master of a vessel. First of all, with a loaded vessel, she will go sideways, and I will either lose my housing or my deck-load. The only way of holding the vessel is either to hold her before it, or put the bow on the sea. That is according to my experience. I have had experience since I was thirteen years old. I never saw anybody stop a vessel on the ocean with a sea and wind.

Q. You could have kept on very slowly?



(Testimony of Hans Michaelsen.)

A. I could have kept on very slow, but it takes fuel oil. At eleven o'clock I wanted to know from the chief engineer how much oil I had left. He told me he had about 60 barrels of oil.

Q. Captain, did you prepare the answers to the interrogatories in this case? I will withdraw that question. How much fuel oil do you ordinarily carry for your voyage from Coos Bay to San Francisco?

A. We carry between 260 and 280 barrels.

Q. How many barrels did you start out with on this trip?

A. I don't know exactly. I leave that to the chief. He is responsible for the oil proposition. He is supposed to notify me in time if he is in doubt about the oil. He is supposed to do that. I don't recollect exactly what we had on that date. The chief can tell you what we had when we started.

Q. And you consider it prudent to have been 260 and 290 barrels?

A. Between 260 and 280 barrels.

Q. And you use up about 42 barrels a day?

A. More or less. It depends whether we are steaming. Sometimes it takes me seventy-two hours to come from Coos Bay, and sometimes I come in forty hours, depending on how I strike the weather.

Q. You cannot count on making the voyage in the same time all the time, can you?

A. No, and I cannot count on using the same amount of oil all the time. You don't know what time [131—59] you are up against the high wind. I have always to be on the safe side.



(Testimony of Hans Michaelsen.)

Q. Before you started on this voyage, did you ask the engineer how much fuel oil there was on board?

A. I never ask him about it. He goes to the oil dock and gets the fuel oil in the tank.

Q. You leave that entirely to him?

A. The filling of the oil tank I leave to the chief engineer. Lots of times I am around, but he signs the bill.

Q. You say the first report you got after you went to bed that night was at twelve o'clock?

A. Yes, sir.

Q. And that was to the effect that everything was fine? A. Everything was all right.

Q. And your next report was at 12:40, that the tow was lost?

A. At 12:40 they reported to me it was lost.

Q. When you sighted the "Watson," where was she?

A. The "Watson" was, I should judge, according to my judgment, a good mile inside me, and she passed me about two miles when I discovered her again.

Q. What time did she pass you?

A. I think, as near as I could tell it was close to 8:30.

Q. About 8:30?

A. Yes, as near as I can remember, to my best ability.

Q. Where, in your opinion, under a fresh north-west wind, such as there was, would the barge drift?

(Testimony of Hans Michaelsen.)

A. In my opinion, the barge would drift in toward shore, making south. I figured the barge would be drifting about southeast by east, or something like that. I would figure she was drifting about southeast by east, or something like that. I would figure she was drifting about southeast by east. Sometimes the currents affect it one way or the other. Of course, I could not exactly figure it.

Q. Captain, who keeps the official log?

A. The chief officer. [132—60]

Q. Is not this official log simply copied from the pilot-house log? A. Yes, sir.

Q. And the entries in the pilot-house log would be the same as in the official log; they are copied later into the official log?

A. The pilot-house log is copied into the official log.

Q. Now, Captain, I wish you would tell me more definitely when you made this erasure which appears on September 7th?

A. You say you want the correct time when I erased this?

Q. Yes. A. I cannot give it to you.

Q. Wasn't it when the voyage was all over?

A. No, it was on the way down, if I remember right. To my best knowledge, it was on the way down.

Q. When is the official log written up?

A. The official log is supposed to be written up by the first mate.

Q. At what time?

(Testimony of Hans Michaelsen.)

A. At any time during the day. There is no regular time.

Q. I see in the official log the entry reads: "12:40 A. M. discovered hawser on barge parted, tow loose."

A. Well, as I say, at 12:40 the tow-line parted.

Q. "1:00 A. M. hove to; engines working dead slow."

A. Well, I told you it took us about fifteen minutes to get the line in—well, now, I am not much out on that. Here it is at 12:40, and we hove to at one o'clock. That is twenty minutes. Twenty minutes from the time we discovered it was lost the hawser was in and the vessel was hove to.

Q. That is not what I am trying to get at. If you made the correction as soon as you state you did, why wasn't the correction copied into the official log?

A. That I could not tell you. He wrote it on his way down there, or maybe that very day he went on his watch below, he wrote that in, but I was up on the [133—61] bridge and I said, "Why didn't he enter this hove to, and I may have taken my pencil and wrote it in there; he is there, and if he objects to it or if I write any different he would know it. I have the right to correct the log-book, you know.

Mr. FRANK.—So that the Court can understand the purport of this examination, I desire to read the two entries so that your Honor can see what if any changes were made:

"12:40 discovered tow-line parted; ship was at one o'clock hove to. Engines working dead slow."

The entry in the official log is:



(Testimony of Hans Michaelsen.)

“12:40 discovered hawser on barge parted, tow loose; I hove to, engines working dead slow.”

Mr. DERBY.—I want to know what was in the pilot-house log before the captain made that change. He said he made the change before this was entered up.

Mr. FRANK.—Well, ask him.

Mr. DERBY.—I have asked him. I am satisfied. I should like to offer the log-book in evidence, if it can be spared, the full log.

Mr. FRANK.—Certainly. We will if you do not.

Mr. DERBY.—I ask that it be marked “Libellant’s Exhibit C.” That is all.

Redirect Examination.

Mr. FRANK.—Q. Now, with reference to this log-book, I wish to read from it, if your Honor please. The contention is made the entry was made in the log-book “Moderate sea” for the first three entries. These are the entries.

“6:15 P. M. crossed the bar, moderate. Light on barge went out in crossing the bar. Wind and sea prevented us from lighting it again. Fresh north-west, clear, moderate sea.” [134—62] The entries at the hours which indicate crossing the bar, moderate.

“6:45 C. C.,” meaning change of course.

“8 “ “ meaning change of course.”

Mr. DERBY.—Under the words “moderate sea” the ditto marks appear. The Court can examine it.

Mr. FRANK.—Yes, the Court can examine it it-

(Testimony of Hans Michaelson.)

self to see what is there. Also on September 7th, with reference to the fog, the entries which I wish to call attention to are as follows.

“4: wind moderate, hazy.

“7:25, wind moderate, hazy.

“9:10: Fresh wind, foggy.

“10: Fresh northwest, foggy.

“11:15 clearing.”

That is all, Captain.

[**Testimony of A. Hultgreen, for Respondent.**]

A. HULTGREEN, called for Respondent, sworn.

Mr. FRANK.—Q. What is your name, please?

A. A. Hultgreen.

Q. You were mate on board the “Hardy” at the time now in question? A. Yes, sir.

Q. How long have you been going to sea? ..

A. 21 years.

Q. How long have you been an officer?

A. Three years and three months.

Q. That is, you mean a first officer?

A. I was just taking the place of the first officer; he was off that trip, and I took his place.

Q. Three years and three months is your experience as an officer? A. Yes, sir.

Q. Were you on watch as the vessel went down Coos Bay toward [135—63] the bar?

A. No, it was my watch below.

Q. Were you on deck?

A. I was on deck part of the time.

Q. Were you on deck when you crossed the bar?

(Testimony of A. Hultgreen.)

A. Yes, sir.

Q. Did you notice the barge going over the bar?

A. Yes, sir.

Q. Did you notice when the light went out?

A. I noticed the light went out in passing over the outer edge of the bar, with a kind of a heavy westerly swell coming in, she was jumping heavy and the light went out then.

Q. How long did you remain on deck after that?

A. I was on deck until twelve o'clock.

Q. What was your watch, from six to twelve?

A. From six to twelve, yes, sir.

Q. So you were on watch when the light went out?     A. Yes, sir.

Q. What can you say with regard to the reasonableness of an attempt to have gone out to relight that light that night?

A. In my opinion, it was pretty near impossible to board that barge at any stage from the time we went over that bar until we lost her, and it would have been a needless risk of life and a needless risk of getting a boat swamped to get anywhere near her the way the barge was working in the sea; she would lift up and show half her bottom above the water, and she would jump down again and she would go from one sea to the other, and as the sea increased, she would jump from sea to sea; every sea she would make a jump.

Q. You say the wind and sea increased; what do you mean, from what time to what time?



(Testimony of A. Hultgreen.)

A. After we crossed the bar, we had a westerly swell coming in toward the bar, and as soon as we got clear of the bell buoy and shaped our course toward the southard, we caught the wind, a strong north-west wind.

Q. And it kept on increasing during the night?  
[136—64] A. Yes, sir.

Q. How about the following day?

A. Well, it was strong the whole day. It was strong all the way down, and in the afternoon before we lost the barge, it increased a good deal, as it most always does near Cape Mendocino and Point Gorda; with northwest weather there is almost always a stronger breeze blowing a few miles to the northward and a few miles to the southward of those points.

Q. Were you on watch at the time the barge was lost?  
A. Yes, sir.

Q. How many men were on watch, or who was on watch; what watch was there?

A. There was the regular watch, a man at the wheel and a man at the lookout, and one man specially looking out for the barge.

Q. Where was he stationed?

A. He was stationed aft.

Q. Where? A. On the poop.

Q. Does her poop run up to the stern?

A. The poop is right aft the afterdeck. My position up on the bridge is above it, on top of the house, where I have a view right astern and all around.

(Testimony of A. Hultgreen.)

Q. I understand that, but what I want to get at is, her poop is aft, and it runs up flush with the stern of the vessel, does it?

A. Yes, sir; there is just a rail around the stern.

Q. The line of the tow came up over the poop, did it not?

A. Yes, sir; and made fast to the bitt.

Q. And on that poop is where the man was watching the tow?      A. Yes, sir.

Q. And your position was on the bridge?

A. Yes, sir.

Q. And you could see the tow from the bridge, also?

A. I had a clear view, I could see the tow from the bridge.

Q. What could you see of the tow during the night, to ascertain [137—65] whether she was there or not?

A. When I came up at twelve o'clock, it was a very dark and cloudy night, but otherwise seemed to be pretty clear, but it was very dark, but you could plainly see the milk-white foam, and the forepart of the barge was riding over the sea; you could also see by the hawser. I relieved the second officer, and made myself sure that the barge was there.

Q. Previously to the loss of the barge, what, if anything, did you do about going down and examining the tow-line?

A. About twenty minutes past twelve I went down and had a look at the chock where the line went



(Testimony of A. Hultgreen.)

through to see that the chafing-gear was all right, and at that time I plainly saw the barge astern. I went up on the bridge again, and I was walking up and down there looking ahead, and once in a while—once every minute or so—looking astern, taking a view all around, as we have to do, having charge of a ship on the watch, and at about twenty-five minutes to one, as near as I can recollect it was, I looked and I did not see the foam, I could not see the foam there; I thought perhaps it had run to the side, and the foam was ahead for a little while; sometimes it would take a shear on the sea and you could not see the foam so plain. So I was looking very sharp for the barge for a minute or so, and I sung out to the man who was stationed there to look out for the barge, “Can you see the light—I mean, can you see the barge?” He said, “No.” I took the glasses and I looked through the glasses, and I didn’t see no sign of her, and so I called the master right then and there. As soon as the master was called, I called the watch on deck, and they came aft and we started to heave in the hawser, and we took the hawser through the capstan. Meanwhile the captain was up and the ship was stopped. As soon [138—66] as the hawser was in, I went up to the bridge to the captain and reported the hawser in, and he ordered the helm hard aport and we hove her to.

Q. After that, what did you do? Go on and tell the story of what you did to try to pick her up, and what you saw?



(Testimony of A. Hultgreen.)

A. We were laying hove to then, working the engines so as to keep steerage way on the ship.

Q. What direction was the wind and the set?

A. The wind and sea was northwest.

Q. That was a following sea?

A. It was a following sea when we were towing, following wind and sea. We were hove to, and in the morning when I came on deck after breakfast—my watch below was from four to eight, and when I came on deck, the ship was heading south again. Then when I came on deck it was hazy, half foggy; it was what you would enter as hazy, with drifting fog once in a while. After I had been on the bridge for a while, I guess about half past eight or so, it kind of cleared up a little while, and we saw a steamer on our port bow that we made out to be the “Watson” or the “Buckman,” we could not say which of the two, because they are alike, but we could see it was one of the two, it was on our port quarter, about a mile or a little more; it had just passed us; we just saw her for a couple of minutes and she disappeared in the fog again. We continued on our course. We kept a point more in and then changed the course out a point or so, so as to kind of go a little to either side.

Q. You mean you zig-zagged?

A. Yes, sir, and then a little while afterwards, about nine o'clock, it set in real foggy, and we could not see very far then.

Q. What means did you take to search the sea,

(Testimony of A. Hultgreen.)

to look out to [139—67] see if you could find the barge?

A. We were all looking out from all parts of the ship, everybody on board the ship was looking for the barge, up in the rigging several times; the captain was up with the glasses in the rigging when the fog lifted for a little spell. We were all very busy looking for the barge that forenoon.

Q. Were you present up in Coos Bay when the captain and Mr. Banks talked these matters over?

A. No, sir.

Q. Were you present in San Francisco when Mr. Rosenthal and Mr. Davenport came down?

A. I was present, but I did not hear any of their conversation. I was standing on one side after on the deck where the hawser was coiled up, and the captain and those gentlemen were standing on the other side, conversing there, but I did not hear any of their conversation. The only thing, when they were through, they walked over toward the hawser and were looking at the hawser, and I remember picking it up and taking it in my hands and showing the strands of it; I was trying to break it between my hands, but I could not.

Q. That is, you mean the thread of the hawser?

A. Yes, sir.

Cross-examination.

Mr. DERBY.—Q. What time did you leave Coos Bay? A. Five o'clock.

Q. What time did you cross the bar?



(Testimony of A. Hultgreen.)

A. We were across the bar at 6:15.

Q. What time does the "Hardy" usually take to cross the bar?

A. It all depends; at this time it commenced to ebb very fast as we went over. It was ebbing all the time from the time we left the dock down to the bar, and in that case she goes very fast. There would be quite a difference between when you got out with the flood tide, that is, the tide against you. [140—68]

Q. That is, the tide was ebbing all the time you were going up there?

A. Yes, sir; that is, slack water part of the way.

Q. Was the sea moderate during that first night, September 5th?

A. Well, it was what we call moderate. The sea may be pretty big, but we will still call it moderate. We don't usually call it a heavy sea unless it is accompanied with a gale, or else a heavy swell setting in with moderate wind.

Q. You say you were on watch at the time the barge was lost?      A. Yes, sir.

Q. And a man at the wheel?      A. Yes, sir.

Q. And one lookout?      A. Yes, sir.

Q. Where was the general lookout?

A. There was one forward and there was one special aft.

Q. There was one lookout at the aft, looking after the barge?

A. Yes, sir; that man was specially to look out for



(Testimony of A. Hultgreen.)

the barge, on account of her having no light.

Q. How did you happen to go down at 12:20 to look at the barge yourself?

A. I relieved the second officer at 12 o'clock, and of course, I came on deck just then. We are called at ten minutes to twelve. By the time I got my clothes on and got up to relieve him, I just went up and relieved him and then I went and took a run down to look at the hawser to see that everything is all right. When I am in charge of the ship I am in charge of the tow, too, and everything connected with it, and I have to see that everything is all right.

Q. You saw it was all right, because you could see the foam coming up against the side of the barge?

A. I could see the barge myself, I could see that it was there. I went down to see that the chafing-gear was all right, and seeing that it would not chafe and be damaged where it led into the rail. I had a clear view [141—69] from the bridge all around the horizon, and I could see the barge at any time from my station.

Q. How far do you think you could see that night?

A. That is pretty hard to judge. I did not see no light. At twelve o'clock, or at the time I came on deck, I may have been able to see—well, I would not judge, because it is pretty hard to judge. When it is that dark, you don't know when you see a light how far you really can see. It may be kind of hazy, and the dark prevents you seeing, whether it is hazy or clear. If the stars are all out, you can see the horizon, but if it is cloudy and hazy the stars and the

(Testimony of A. Hultgreen.)

horizon seem to melt together, you cannot tell whether it is a light haze or whether it is perfectly clear.

Q. I see that at the time the line parted, you have an entry in your log that the weather was clear?

A. Yes.

Q. Is that correct?      A. Yes, sir.

Q. And also that there was a moderate sea?

A. That is correct, too, so far as we are use to making the entries along the coast there.

Q. After you discovered the loss of the barge, you immediately notified the captain, did you?

A. Yes, sir.

Q. What did the captain do when he came up on deck?

A. The captain came right up on deck. When I called him, he said to me to call the watch and get the hawser in. I had the watch called and the captain came on deck immediately, and as soon as the captain came up I went down to make arrangements to get the hawser in, take it through the capstan and heave it in. As soon as the captain came on deck I went down below, and I heard the bell given to stop the engine.

Q. How long did it take you to get in the hawser?

A. It took [142—70] about fifteen minutes, I guess, or something like that; I did not exactly count it up.

Q. Did it take as long as that?

A. Yes, I guess so, from the time we started in to get together and get the turns of the bitt. When you



(Testimony of A. Hultgreen.)

have a hawser well made fast, you have all kinds of turns around the bitt, and you have to take that all off and the turns, and then lead it to the capstan. The capstan works very slowly.

Q. What time did it begin to get foggy on September 7th, the day the barge was lost?

A. I could not tell what time it did commence to get foggy; it commenced to get real foggy about nine o'clock in the morning, what we call real foggy when we commence to blow the foghorn.

Q. When did it clear up?

A. It cleared up around eleven o'clock, or somewhere around there.

Q. What time did you start for San Francisco?

A. We started for San Francisco at 11:15. We started to San Francisco in the morning, in the direction of San Francisco, just after daylight, and we started off full speed at 11:15. I heard the captain talking about it, that there was no use to risk going north any more and then coming south again, because he would not have enough fuel oil to bring us in.

Q. You remember Mr. Rosenthal and Mr. Davenport coming down on the day of the "Hardy's" arrival and talking with the captain?

A. Yes, I remember that; I was just telling you I was showing them the condition of the hawser.

Q. I understand you passed the "Watson" at about 8:30 and she was about a mile on your port bow?



(Testimony of A. Hultgreen.)

A. On our port quarter; she had already passed.  
[143—71]

Q. Supposing you had sighted the barge that morning, what would you have done?

Mr. FRANK.—Just a minute. He is not in command of the ship. It is not for him to say what the captain would have done under the circumstances.

Mr. DERBY.—I submit that the question is proper, your Honor.

The COURT.—While that is probably true, it is a vague matter that does not throw any light on the question.

Mr. DERBY.—Very well, your Honor, that is all.

The COURT.—Q. How long was the barge lost before you missed her?

A. The barge could have been lost about a quarter of an hour at the most.

Q. Not more than that?

A. No, because I discovered her loss at twenty-five minutes to one, and twenty minutes after twelve I was down looking at the hawser and she was there, I am certain she was there; the barge could have been lost at any time between twenty minutes past twelve and twenty-five minutes to one, when I discovered it.

Q. How long was the line between the vessel and the barge?

A. I could not tell. We had pretty near the whole hawser out. I don't know the length of the hawser. There were just a few bites left for taking additional turns or making additional turns.

[**Testimony of K. Knudson, for Respondent.**]

K. KNUDSON, called for the Respondent, sworn.

Mr. FRANK.—Q. Mr. Knudson, you were chief engineer of the “Hardy” at the time of the loss of this barge? A. Yes, sir. [144—72]

Q. How long have you been running as the chief engineer of that vessel? A. Ten months now, sir.

Q. Were you present at the time that Mr. Rosenthal and Mr. Davenport came down to the ship and had the conversation they testified to with the captain? A. Yes, sir, they spoke to me first.

Q. What did they have to say to you?

A. They asked me for the captain and I told them that the captain was not on board.

Q. What passed then?

A. Then Mr. Rosenthal asked me something about the loss of the barge. How the conversation started I cannot very well recollect, but I remember he said to me “How was it you didn’t notice it on the main engine down below”? He thought it ought to go faster. And I explained to him how it was we did not notice it, the tow was easy, the wind and sea came along with us and we had no trouble at all, it didn’t make any difference to the speed. Then in the meantime the captain came and they turned around and spoke to the captain, and they were talking about the hawser and examined the line, and so forth. I didn’t pay much attention to the talk but they were still standing on the deck there.

Q. Did you hear the conversation related by Mr.



(Testimony of K. Knudson.)

Rosenthal between himself and the captain as to why the captain did not relight that light after it went out?     A. Yes, sir.

Q. What was it?

A. The captain told him, the same as I did, that it was on account of the weather, that he would not risk no man's life on the boat.

Q. With respect to the fuel on that vessel, that is under your particular charge, is it not?

A. Yes, sir.

Q. Did you sound the tanks that morning after you had been [145—73] searching for the barge, to see what fuel you had on board?     A. Yes, sir.

Q. What did you determine after you sounded the tanks?

A. I came to the conclusion I had about 60 barrels on board, as near as I could figure.

Q. With respect to its being sufficient to bring you in, or not, what do you say?

A. Well, I was figuring that I would not take the chances of running short of oil, or else I would be up against it.

Q. When you came in did you measure the tanks again?     A. Yes, sir.

Q. What did you find?

A. In the neighborhood of 20 barrels.

Q. How many available barrels was that? Do you understand what I mean by available? How many barrels of the twenty could be used?

A. Well, from my experience steamboating there



(Testimony of K. Knudson.)

is no suction-pipe that goes right down to the bottom of the tank, you can always figure five or perhaps more barrels that you cannot suck out.

Q. So that the most you would have available would be about 15 barrels?

A. Yes, sir, something like that.

Q. What would you consider with regard to the safety of the vessel, as to the reasonableness of coming in or attempting to make port with a less surplus than that?

A. Well, I would not take the chances of having any less in case of a head wind and sea, I would want something to work on.

Q. You don't think it would be good seamanship to do that; is that the idea?      A. That is the idea.

Q. You have two assistants, have you not?

A. One assistant.

Q. Are you up on deck at times observing the conditions on deck?

A. Yes, sir, very often. [146—74]

Q. Were you on deck during this voyage at any time, on the poop-deck, noticing the barge?

A. Yes, the same as usual; I go up every few minutes and stay up for awhile and then I go down again.

Q. What have you to say concerning the condition of the sea and the behaviour of the barge during the day preceding her loss?

A. Well, it was pretty rough; that is all I have to say. There was a pretty strong wind and a high sea going. That is the only thing I can say about

(Testimony of K. Knudson.)

the weather and the wind.

Q. You are not a navigator—you are only an engineer?

A. That is all, sir. It was pretty rough.

Q. How long have you been going to sea as an engineer?      A. About 15 years.

Q. You know the difference then between what might be called a rough sea and a smooth sea, don't you?      A. Yes, I do.

Cross-examination.

Mr. DERBY.—Q. Who asked the captain the question about why he did not relight his light?

A. Mr. Rosenthal and the two were together; who asked the question first I would not say but the two of them were talking to the captain, maybe at once; the two of them had something to say about it.

Q. What was the captain's reply to that?

A. He said the weather was in such a way that he would not risk no man's life in a boat.

Q. How many barrels of fuel-oil were there on board at the time you started the voyage?

A. Well, that I could not very well tell now. I sound the tanks before we leave, I sound the tanks for my own curiosity, to see that I am on the safe side to bring the vessel down.

Q. Don't you aim to have a certain amount of fuel-oil? [147—75]

A. Yes, and if I think I will run short I report to the captain; if I think there will be plenty I don't say nothing.

(Testimony of K. Knudson.)

Q. How much do you figure to have on a voyage down from Coos Bay to San Francisco, how much do you figure to have in your tanks?

A. Well, I would not go down with anything less than 130 or 140 barrels, not with anything less.

Q. Different voyages take different times, don't they?

A. Oh, sure; it all depends on the weather and wind.

Q. You always count on leaving with a considerable leeway as to the amount of oil you will take, do you not? A. Yes.

Q. And you knew on this voyage you were going to take down this tow?

A. Not leaving here I didn't; I knew it up there.

Q. If there had not been enough fuel-oil to take that tow down, you would have told the captain, would you not?

A. Oh, certainly, that is a sure thing.

Q. Were you in the engine-room at the time the tow broke loose?

A. I was on deck; I was sitting in my room and that is pretty near on deck.

Q. Was some other engineer on watch?

A. Yes, sir.

Q. Wouldn't there be a difference in the working of the engines if the tow was attached or the tow was not attached?

A. No, sir; well, it would make a difference when we come to see a revolution, we would make some-



(Testimony of K. Knudson.)

times a revolution more without the lighter than you would with the lighter but there would not be enough to feel it.

Q. Wouldn't you feel the shock of the tow breaking loose?

A. No, we didn't feel it down below, and I don't think anybody on deck felt it; we could not tell the difference on the engine without standing and listening to it. That is what Mr. [148—76] Rosenthal asked me.

Q. When was your next watch?

A. At 6 o'clock in the morning.

Q. Who was on watch from 12 to 6?

A. The first assistant.

Q. Is he here? A. No, sir.

Q. Where is he?

A. He is on board. By law it requires one engineer to be on board and he could not leave unless we stopped work.

Q. Whose rule is that?

A. The United States Inspectors.

Q. What is the "Hardy" doing now?

A. She is discharging.—

**[Testimony of Henry Preegen, for Respondent.]**

HENRY PREEGEN, called for the Respondent, sworn.

Mr. FRANK.—Q. You were one of the crew of the "Hardy," were you?

A. I was at that time, just on that trip.

Q. Where were you stationed?

(Testimony of Henry Preegen.)

A. I was aft on the poop-deck there.

Q. What were you doing?

A. Just stationed there specially to watch out for the barge.

Q. How long had you been there?

A. From 6 to 12.

Q. From 6 to 12?      A. That night, yes.

Q. And at 12 o'clock were you relieved?

A. I was relieved at 12 o'clock.

Q. Who relieved you.

A. Well, Joe—I don't know his last name; he was a sailor; I don't know his last name.

Q. He is not on the "Hardy" now?

A. No, I don't think he is.

Q. During the time you were watching the barge, how did you tell she was there?

A. By the foam and then every once in awhile you would get a glimpse of it. You can kind of see the form of it riding up and down, you could see the form of [149—77] the vessel and the way she was riding she would naturally throw some foam.

Q. What was the condition of the sea?

A. It was a very high sea and a very strong north-west wind. High seas were running.

Q. How was it after the barge was lost?

A. It was kind of high; the high seas seemed to continue. It kind of calmed down later in the day, towards 12 o'clock or so.

Q. You were then on your way home?

A. We were then on our way home, we just started.

(Testimony of Henry Preegen.)

Mr. FRANK.—Take the witness.

Mr. DERBY.—No cross-examination.

The COURT.—Q. You did not see whether or not the barge was there when you went off watch?

A. It was there, yes, sir.

**[Testimony of Rudolph Sanne, for Respondent.]**

RUDOLPH SANNE, called for Respondent, sworn.

Mr. FRANK.—Q. You were a sailor on the “Hardy” at the time of this accident, were you?

A. Yes, sir.

Q. How long have you been going to sea?

A. About nine years.

Q. At the time of the accident where were you stationed? A. I was right at the wheel.

Q. What was the condition of the weather?

A. It was pretty rough then.

Q. Were you on deck when the vessel passed over the Coos Bay bar?

A. Yes, sir, I was at the wheel helping. Two men were at the wheel; I was at the lee wheel; I was helping the man at the wheel.

Q. When did the light go out?

A. Of course, I could not see because I was at the wheel, but they said it was going over the [150—78] bar. I could not see it.

Q. After you passed over the bar, having in view the condition of the weather and the time of the day, what would be your judgment as to the reasonableness or safety of putting off a boat in order to relight that light?



(Testimony of Rudolph Sanne.)

A. Well, of course, as long as we were on the bar we could not put off a boat because it was too rough and breaking too much, and when we got outside in safety for the vessel, far enough off shore so that the captain could stop without drifting ashore, it was getting dark, and when it was dark a fellow could not very well climb on board the barge then.

Q. What was the condition of the sea at that time?

A. Pretty big swells.

Q. What was the condition of the sea from that time on up to the time the barge was lost?

A. The next day it was still rough, blowing pretty good in the morning. We had a watch on deck in the morning, from 8 to 12—we had a watch below, and in fact I had a watch on deck again, and I was working aft, and I was looking at the barge, and she was more than tossing around there and it was impossible to get a boat alongside the barge at that time.

Q. You were down below from what time do you say? A. From 8 to 12 in the morning.

Q. So you don't know anything about the conditions at that time?

A. No, but it was blowing in the morning, and it was blowing when I came on deck again at 12 o'clock, so it must have been blowing all the time.

#### Cross-examination.

Mr. DERBY.—Q. You say it was getting dark when you were going across the bar?

A. Yes, sir, when we got far enough [151—79] out to sea.

(Testimony of Rudolph Sanne.)

Q. The sea was fairly moderate?

A. Well, there was a big swell.

Q. If it had not been for the darkness the sea alone would have prevented putting down a boat, would it?

A. Well, I guess you could have managed then all right but when it was dark and at the same time a big sea it would have been impossible.

Q. You say the next day it got rougher?

A. Yes, sir, and it was blowing like anything too.

Q. Did the water come aboard the barge?

A. No, I think she kept on top of the water, but the way she was tossing around you couldn't get near her.

Q. Wouldn't the waves wash over her?

A. No, I don't think so, as far as I remember; it got so high that she was just about clear of the water sometimes.

Q. She went through this tremendously rough weather without getting the slightest water on board?

A. I would not say as to that. She was light. If she had a load on her the water would shoot all over her, but she was so light she was just like a feather and she just kept on top of the water all the time.

Mr. FRANK.—That is the case, your Honor.

**[Testimony of Robert Banks (Recalled in Rebuttal).]**

ROBERT BANKS, recalled in rebuttal:

Mr. DERBY.—Q. Mr. Banks, when did you come



(Testimony of Robert Banks.)

down this last time?      A. Sunday morning.

Q. Did you sail down?

A. Yes, sir, I came down on the steamer "Speedwell." [152—80]

Q. Did any other steamer come down at about the same time?

A. The steamer "Hardy" and the "A. M. Simpson" came out ahead of us, about half an hour ahead of us.

Q. Do you know how long the "Speedwell" and the "Hardy" took to get from Coos Bay to the bar?

Mr. FRANK.—I submit that that is immaterial.

Mr. DERBY.—I am endeavoring to show that this light went out before the ship crossed the Coos Bay bar, and that it would have been perfectly possible in the harbor to have let down a boat. I want to show that the usual time for crossing the bar is about an hour and 45 minutes and that ships cannot go out of there in less than that, because of the dangerous shoals. While the evidence may not be of any great weight, I submit it is certainly admissible.

The COURT.—Do you mean as fixing the time when the light went out? They have fixed it by the place.

Mr. DERBY.—They have fixed a time also; they have fixed the time as 6:15.

The COURT.—They have figured the place definitely as the outer edge of the bar. That is a definite place.

Mr. DERBY.—Of course, if your Honor has de-



(Testimony of Robert Banks.)

cided to accept that statement, I suppose that ends it.

The COURT.—I don't say that that could not be contradicted, but I do not think that testimony as to how long it takes to go down the bay would contradict it.

Mr. DERBY.—We put interrogatories as to the time when the light went out and in answer to those interrogatories they say the light went out at 6:15. We are prepared to show that the "Hardy" could not have crossed the bar as soon as that.

The COURT.—If you have definite testimony as to the time, [153—81] 6:15, I will take that testimony.

Mr. DERBY.—I would not say, your Honor, that I have definite testimony as to that time.

The COURT.—There was some testimony given here about 6:15, but that was given in connection with a place, as being the outer edge of the bar, when the light went out.

Mr. DERBY.—The point I am trying to make is that taking the time when she started she could not have got outside the bar within that short time.

The COURT.—Suppose I say I met you at a fixed place that both of us know; we could not be mistaken as to the place, but we might be mistaken as to the time. That is all I am trying to state. A place is a thing we all know and the time is a thing we are all guessing at unless we make a note of it. For that reason, if you fix a definite place you fix a more definite thing than an indefinite time.

(Testimony of Robert Banks.)

Mr. DERBY.—Of course, the place is fixed by interested witnesses and we have no means of contradicting it.

The COURT.—I understand that, and so far as that is concerned if they were fixing a time to estimate a certain thing—I do not say that they would that in this case, but according to your idea if they were fixing a time they would probably fix it late enough.

Mr. DERBY.—Q. How long did it take that night for those two vessels to come out?

A. The night that I came out?

Q. Yes.

A. We left North Bend at a quarter past 2—I did on the “Speedwell”; at 4 o’clock we were outside the bar.

Q. How about the “Hardy”?

A. The “Hardy” was ahead of us about the same distance, practically the same distance as she was when she left. They figured the “Speedwell’s” time about [154—82] an hour and three-quarters from the time we left the dock until we were out to the buoy.

Q. Are you familiar with Coos Bay?

A. Fairly, yes, sir.

Q. Is it a dangerous location? Is there any difficulty in getting out of the channel?

A. No, there is no difficulty in getting out. Of course, if the vessel is loaded they have to take the high tide on account of the shoals at certain places.

Q. What I mean is, do vessels proceed as fast be-



(Testimony of Robert Banks.)

fore they get outside as they do after they get outside? A. As a rule they do not.

Q. After this loss of the barge on the "Hardy," did you come on the "Iaqua" when the second barge was towed down? A. Yes, sir.

Q. How was the weather on that voyage?

Mr. FRANK.—What is the purpose of this?

Mr. DERBY.—I propose to show that on this voyage of the "Iaqua" there was an exceedingly rough sea and a strong northwest wind, that the barge broke adrift, and that the "Iaqua" had not the slightest difficulty in letting down a boat and getting their men aboard the barge and picking the barge up.

Mr. FRANK.—I do not see how that applies to this case. We would have to try all the details of that matter. And then if they had another one, we would have to try all the details of that other one. It would be interminable.

The COURT.—That is the trouble, we would have to try the storms and the sea and the winds surrounding the second barge.

Mr. DERBY.—These witnesses have testified that in a strong northwest wind it is exceedingly dangerous to put down a boat and get aboard a barge. We want to show that it was done in another case almost exactly similar. [155—83]

Mr. FRANK.—Well, we will have to find out if it was exactly similar. In a matter of this sort, where it is a matter of discretion and judgment on the part



of the master, where he is using ordinary diligence in the matter his judgment is conclusive on that point.

The COURT.—The objection will be sustained.

Mr. DERBY.—Q. You heard Captain Michael-  
sen's testimony in regard to his statement that he  
would take no risks in this tow? A. Yes, sir.

Q. Was any such statement made to you?

A. No, sir.

Mr. DERBY.—That is all.

Mr. FRANK.—That is all.

Mr. DERBY.—That is our case.

(Thereupon the cause was submitted on briefs to  
be filed in 10, 20 and 5.)

[Endorsed]: Filed Jun. 9, 1914. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [156—  
84]

---

**[Minutes of Hearing—June 2, 1914.]**

At a stated term of the District Court of the United  
States of America, for the Northern District of  
California, First Division, held at the courtroom  
thereof, in the City and County of San Fran-  
cisco, on Tuesday, the 2d day of June, in the  
year of our Lord, one thousand nine hundred  
and fourteen. Present: The Honorable M. T.  
DOOLING, Judge.

No. 15,484.

K. V. KRUSE &amp; R. BANKS, etc.,

vs.

THE AM. STEAMER "HARDY," etc.

This cause this day came on regularly for hearing. S. H. Derby, Esq., appeared as Proctor for Libelants and N. H. Frank, Esq., as Proctor for Respondent. Mr. Derby stated the case of the libelants and introduced in evidence the deposition of O. P. Brit et al., and the deposition of Richard C. Brennam, together with a chart which was filed and marked Libelants' Exhibit "A." Mr. Derby then called Henry C. Peterson, Robert Banks, Louis Rosenthal, J. E. Davenport and A. F. Pillsbury, who were each duly sworn and examined on behalf of the libelants. Mr. Derby also introduced in evidence a certain chart which was filed and marked Libelant's Exhibit "B," and a certain log-book which was marked Libelant's Exhibit "C," but which was withheld by Mr. Frank and was not filed, at the request of Mr. Frank and with the consent of Mr. Derby. Thereupon, Mr. Derby rested the case for the libelants. Mr. Frank introduced in evidence the depositions of L. F. Falkenstein and Edgar N. Simpson, on behalf of the respondent, and called A. Hultgren, K. Knudson, Henry Peggen and Rudolph Sanne, who were each duly sworn and examined on behalf of respondent. Thereupon, Mr. Frank rested the defense of the respondent. Mr. Derby then recalled Robert Banks on behalf of the libelants. The case was then submitted

to the Court on Briefs to be filed in 10, 20 and 5 days. [157]

---

**[Minutes, March 5, 1915, as to Filing of Opinion, etc.]**

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco on Friday, the 5th day of March, in the year of our Lord, one thousand nine hundred and fifteen. Present: The Honorable M. T. DOOLING, Judge.

No. 15,484.

K. V. KRUSE and R. BANKS, Copartners, etc.,

vs.

The Am. Stmr. "HARDY," etc.

In this cause the Court this day filed Opinion, and ordered that a Decree be entered herein in favor of Respondent. [158]

---

**[Conclusions and Order That Decree be Entered in Favor of Respondent.]**

[Title of Court and Cause.]

(OPINION AND ORDER TO ENTER DECREE IN FAVOR OF RESPONDENT.)

McCLANAHAN & DERBY, Proctors for Libelants.

NATHAN H. FRANK, Esq., and IRVING H. FRANK, Esq., Proctors for Claimants.

In this case my conclusions are as follows:



1. That libelants furnished the hawser to the steamer "Hardy" for the purpose of towing their barge to San Francisco, and that the "Hardy" was not responsible for the parting of such hawser, which was the real cause of the loss of the barge;

2. That it was for the captain of the "Hardy" to determine whether or not light on the barge could have been relighted without danger of losing his men in the attempt, and the evidence shows that the possibility of such danger was so great that the Court will not review the action of the captain in that regard.

3. The loss of the barge under all the circumstances was discovered as seasonably as could reasonably be expected. [159]

4. The "Hardy" was not negligent in failing to keep up a longer search for the barge.

For these reasons a decree will be entered in favor of respondent.

March 5th, 1915.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Mar. 5, 1915. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [160]

*In the District Court of the United States, for the  
Northern District of California, Division One.*

No. 15,484.

K. V. KRUSE and R. BANKS, Copartners Doing  
Business Under the Firm Name of KRUSE &  
BANKS SHIPBUILDING COMPANY, on  
Behalf of Themselves and Their Under-  
writers,

Libelants,

vs.

The American Steamer "HARDY," Her Tackle, Ap-  
parel and Furniture,

Libelee,

M. J. SAVAGE, EDW. J. MORSER, JAMES H.  
HARDY, INC., JAMES H. HARDY, HANS  
MICHAELSON, Mrs. F. RULFS and Dr.  
ALEXANDER WARNER,

Claimants.

### **Final Decree.**

The above cause having come duly on to be heard  
on the pleadings and proofs of the respective parties  
and the same having been argued and submitted, and  
an opinion having been filed on the 5th day of March,  
1915, in favor of the libelee and claimants herein.

NOW, THEREFORE, on motion of W. S.  
Andrews, proctor for the claimants,

IT IS HEREBY ORDERED, ADJUDGED AND  
DECREED, that the libel herein be and the same

hereby is dismissed, with costs to the claimants.

Dated San Francisco, June 7, 1915.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Jun. 7, 1915. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [161]

---

[Title of Court and Cause.]

**Notice of Appeal.**

To M. J. Savage, Edw. J. Morser, James H. Hardy,  
Inc., James H. Hardy, Hans Michelson, Mrs.  
F. Rulfs and Dr. Alexander Warner, Claimants  
in the Above Cause, and to W. S. Andrew, Esq.,  
Their Proctor.

You and each of you are hereby notified that K. V.  
Kruse and R. Banks, copartners doing business  
under the firm name of Kruse & Banks Shipbuilding  
Company, on behalf of themselves and their under-  
writers, libelants above named, do hereby appeal to  
the United States Circuit Court of Appeals for the  
Ninth Circuit from the final decree of the above-en-  
titled court made and filed in the above-entitled cause  
on June 7th, 1915, dismissing the libel herein with  
costs.

Dated San Francisco, June 14th, 1915.

McCLANAHAN & DERBY,

Proctors for K. V. Kruse and R. Banks, Copartners,  
etc., Libelants. [162]



Receipt of a copy of the within Notice is hereby admitted this 14th day of June, 1915,

W. S. ANDREWS,  
Proctor for Claimants.

[Endorsed]: Filed Jun. 15, 1915. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [163]

---

[Title of Court and Cause.]

### **Assignment of Errors.**

Now come K. V. Kruse and R. Banks, copartners doing business under the firm name of Kruse & Banks Shipbuilding Company, libelants and appellants herein, and say that in the record, opinion, final decree and proceedings in the above cause there is manifest and material error, and said appellants now make, file and present the following assignment of errors on which they rely, to wit:

#### **I.**

That the Court erred in holding and deciding that the libelants furnished the hawser to the steamer "Hardy" for the purpose of towing their barge to San Francisco, and that the "Hardy" was not responsible for the parting of such hawser; and in not holding and deciding that the master of the "Hardy" himself furnished said hawser and in not holding the "Hardy" [164] responsible for the parting thereof.

#### **II.**

That the Court erred in holding and deciding that the parting of said hawser was the real cause of the loss of said barge.

## III.

That the Court erred in holding and deciding that the possibility of danger in relighting the light on the barge was so great that it would not review the action of the master of the "Hardy" in not relighting the same, and in not holding and deciding that the "Hardy" was negligent in not relighting said light and that such negligence was one of the proximate causes of the loss of libelant's barge.

## IV.

That the Court erred in holding and deciding that the loss of the barge was discovered by those on board the "Hardy" as seasonably as could reasonably be expected, and in not holding and deciding that the "Hardy" was negligent in not sooner discovering the loss of said barge and that such negligence was one of the proximate causes of the loss of said barge.

## V.

That the Court erred in holding and deciding that the "Hardy" was not negligent in failing to keep up a longer search for said barge, and in not holding and deciding that the "Hardy" was negligent in this respect, and was also negligent in making an absolutely insufficient search for said barge, and that said negligence was one of the proximate causes of the loss of said barge.

## VI.

That the Court, in holding that the "Hardy" was not negligent in failing to keep up a longer search for said barge, [165] failed wholly to note that the "Hardy's" only excuse in that respect was that she



had insufficient fuel oil to do so, and in not holding and deciding that such insufficiency rendered the "Hardy" unseaworthy for her voyage with said barge in tow, and hence rendered her liable for the loss of said barge.

## VII.

That the Court erred in not holding and deciding upon the pleadings and the evidence that the "Hardy" was responsible to libelants for the losses suffered by them in the above cause.

## VIII.

That the Court erred in making, rendering and entering a final decree herein dismissing the libel with costs, and in not making, rendering and entering an Interlocutory Decree in favor of Libelants referring the case to a Commissioner to ascertain the damages of libelants.

In order that the foregoing assignment of errors may be and appear of record said appellants file and present the same, and pray that such disposition be made thereof as is in accordance with law and the statutes of the United States in such cases made and provided, and said appellants pray a reversal of the decree herein and heretofore made and entered in the above-entitled cause and appealed from.

Dated San Francisco, Cal., June 21st, 1915.

McCLANAHAN & DERBY,

Proctors for Libelants and Appellants. [166]

Receipt of a copy of the within Assignment of Errors is hereby admitted this 21 day of June, 1915.

W. S. ANDREWS,  
Proctor for Claimants.



[Endorsed]: Filed Jun. 22, 1915. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [167]

---

[Title of Court and Cause.]

**Stipulation and Order for Sending Up Original  
Exhibits.**

Whereas, the original exhibits in the above-entitled cause (four in number) are of such a nature that it would be difficult and expensive to copy the same; now, therefore,

It is hereby stipulated and agreed that all of said original exhibits introduced in evidence in the above cause may be sent up to the United States Circuit Court of Appeals for the Ninth Circuit on the appeal herein as original exhibits and need not be copied.

Dated June 21st, 1915.

McCLANAHAN & DERBY,  
Proctors for Appellants.  
W. S. ANDREWS,  
Proctor for Appellee, [172]

---

**Order [Directing That Original Exhibits be Sent to  
Appellate Court, etc.].**

Pursuant to the foregoing stipulation, IT IS HEREBY ORDERED that the original exhibits introduced in evidence in the above cause may be sent up to the United States Circuit Court of Appeals for the Ninth Circuit as original exhibits and need not be copied.

Dated June 22, 1915.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Jun. 22, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [173]

---

**[Certificate of Clerk U. S. District Court to Apostles  
on Appeal.]**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing and hereunto annexed 174 pages numbered from 1 to 174, inclusive, with the accompanying exhibits, four in number (transmitted separately in their original form), contain a full, true, and correct transcript of the records and proceedings, as the same now remain on file and of record in the clerk's office of said District Court, in the cause entitled K. V. Kruse and R. Banks, copartners, etc., vs. The American Steamer "Hardy," etc., numbered 15,484, which said Apostles on Appeal are made up pursuant to and in accordance with "Praeceptum for Transcript on Appeal," copy of which is embodied herein, and the instructions of Messrs. McClanahan & Derby, Proctors for Libelants and Appellants herein.

I further certify that the cost of preparing and certifying the foregoing Apostles on Appeal is the sum of Seventy-one Dollars (\$71.00), and that the same has been paid to me by the proctors for appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court,

this 29th day of June, A. D. 1915.

[Seal]

W. B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled  
June 29, 1915. C. W. C.] [175]

---

[Endorsed]: No. 2618. United States Circuit Court of Appeals for the Ninth Circuit. K. V. Kruse and R. Banks, Copartners Doing Business Under the Firm Name of Kruse & Banks Shipbuilding Company, a Corporation, on Behalf of Themselves and Their Underwriters, Appellants, vs. M. J. Savage, Edw. J. Morser, James H. Hardy, Inc., James H. Hardy, Hans Michelson, Mrs. F. Rulfs and Dr. Alexander Warner, Claimants of The American Steamer "Hardy," Her Tackle, Apparel and Furniture, Appellees. Apostles. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed June 29, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.





No. 2617.

# United States Circuit Court of Appeals

For the Ninth Circuit

INTER-ISLAND STEAM NAVIGATION  
COMPANY, LIMITED, an Hawaiian  
Corporation,

*Plaintiff in Error,*

VS.

GEORGE E. WARD,

*Defendant in Error.*

Error  
to the  
Supreme  
Court of  
Hawaii.

## BRIEF FOR DEFENDANT IN ERROR

E. A. DOUTHITT,

*Attorney for Defendant in Error.*

Filed this.....day of October, 1915.

F. D. MONCKTON, Clerk.

By.....  
Deputy Clerk.

Filed

OCT 13 1915

F. D. Monckton,





# United States Circuit Court of Appeals

For the Ninth Circuit

INTER-ISLAND STEAM NAVIGATION  
COMPANY, LIMITED, an Hawaiian  
Corporation,

*Plaintiff in Error,*

VS.

GEORGE E. WARD,

*Defendant in Error.*

## BRIEF FOR DEFENDANT IN ERROR

The assignments of error in this cause substantially present for consideration the following points of law, as the plaintiff in error claims the evidence shows:

First: There was no proof of negligence.

Second: The proximate cause of the injuries was the act of defendant in error.

Third: The negligence of plaintiff in error, if any, was not the proximate cause of the injuries.

Fourth: Contributory negligence of defendant in error, and

Fifth: Assumption of risk.

For convenience we will hereafter refer to the defendant in error as the "plaintiff," and to the plaintiff in error as the "defendant," and will endeavor to discuss the errors assigned in the order above set forth.

First: *The question of defendant's negligence.*

It is elementary that the law imposes upon the master the duty of furnishing the servant, first, a reasonably safe place in which to work, and, second, reasonably safe and suitable appliances with which to perform his labor. If he fails in either of the above respects and the servant is injured thereby, while in the exercise of ordinary care, the master is liable in damages for the injuries sustained, provided the servant has not assumed the risks of the employment.

Actionable negligence has been defined as

"The failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person would not have done."

*Grand Trunk Ry. Co. vs. Ives*, 144 U. S. 408, 416.

The first question arising from the evidence in this case is: Did the defendant fail to furnish the plaintiff (defendant in error) with a reasonably safe and suitable cable for use on its coal conveyor?

We will endeavor to briefly point out wherein the record discloses such failure.

The condition of the cable was first observed about a month prior to the injuries complained of. At that time "the wires and strands" were wearing off and sticking out. (Printed Record, p. 94), the secretary and treasurer of the defendant being aware of such fact at the time. (Rec., p. 94). As time went on the condition of the cable was becoming worse, due to constant use (Rec., p. 98). On the Saturday immediately prior to the injuries the wires were sticking out from one-sixteenth of an inch to an inch (Rec., p. 99). This condition was general throughout the cable, which was 2800 feet in length (Rec., pp. 99-100). That the cable had come off the pulleys at the scene of the injury two or three times prior to the accident and injuries (Rec., p. 100). On the Saturday immediately prior thereto it was observed that the cable "slipped and kept going up and down around the pulleys" (Rec., p. 106), due to its defective condition (Rec., p. 176). That prior to these occasions the cable had never been known to come off the pulleys at this point (Rec., p. 175), and a cable in good condition would not come off at this part of the conveyor (Rec., p. 191), nor would it rise and fall (Rec., p. 70). Upon observing the defective condition of the cable on Saturday, July 6, 1912, and its tendency to "climb" or rise on the pulleys, the plaintiff advised the secretary and treasurer of such fact, who promised to install a new one (Rec., 178). That plaintiff relied on the promise and continued in his employment pursuant thereto (Rec., 179), because he knew that if the regular



foreman (Akina) in charge of the superstructure of the conveyor was elsewhere engaged he would be called upon to replace the same (Rec., 191). The general operation and supervision of the conveyor were in charge of Akina, the foreman thereof (Rec., p. 152). The main duties of plaintiff were to supervise or boss a gang of laborers in the holds of discharging coal ships so that such vessels might be expeditiously unloaded.

From these facts the jury were authorized to find:

First: The cable was in a defective condition at the time of the injuries and had been so for a month prior thereto.

Second: The defendant was aware thereof.

Third: The cable, due to its defective condition, came off the pulleys two or three times prior to the injuries, the last occasion being on Saturday, immediately prior thereto.

Fourth: That the defendant was aware of these facts, and upon complaint being made promised the plaintiff that it would install a new cable.

Fifth: That plaintiff continued in his employment in reliance upon such promise.

Sixth: That the cable was neither suitable, efficient nor reasonably safe for the purpose required of it.

Counsel in their brief (pages 23-25) would lead the Court to believe that either the crowbar or the cable slipped and "Ward lost his balance and fell

over the edge to the wharf below.” In other words that the injuries were due to Ward losing his balance due to accident. This is neither a correct statement of the evidence, nor a reasonable inference therefrom. It was not an accidental slipping or losing his balance, but the cable itself which came off and carried him, bar and all, to the wharf below. (Rec., p. 309).

The mere fact that no injury had occurred prior to the day of the accident furnishes no room for argument that the cable was neither unsafe, unsuitable nor dangerous. One may as well argue that a loaded shotgun is not a dangerous weapon until it is fired and either injures or kills someone. Indeed the best proof of the dangerous and unsafe condition of the cable was afforded by the accident itself. The evidence shows that the cable, due to its defective condition, left its position, and then it did become a dangerous instrument, because in that event the plaintiff, during the temporary absence of Akina, the foreman of the conveyor, might be called upon to leave his employment on the ship and replace the cable. This would necessarily enhance the risk of injury. So, therefore, we respectfully submit that the failure to provide a suitable and reasonably safe cable was negligence.

The only questions remaining are:

(a) Was such negligence the proximate cause of the injuries?

(b) Were the injuries sustained one of the ordinary risks of plaintiff's employment, in view of the facts and surrounding circumstances?

**The Negligence of Defendant Was the Proximate Cause of the Injuries.**

As a general rule, in order to establish proximate cause, it is necessary that there be a causal connection between the negligent act and the injury. The act must have been such that without it the injury would not have happened.

29 Cyc. 489, 490.

Where the consequences of a negligent act follow in unbroken sequence, so as to produce naturally the injury complained of, the rule is easy of application. So, in this case, if the cable had broken while in operation, due to its defective condition, and the plaintiff had been injured thereby, there would be no question as to the proximate cause of the injuries. While not waiving the position that the injuries followed in unbroken sequence from the original act of negligence, yet we believe the solution of the question depends more on the application of other principles of the law of proximate cause.

**Where the Negligence of the Master Sets in Motion Another Agency, Which in Turn Produces Injury, He Is Liable For the Damage Sustained.**

Where the master by his own negligent act has set in motion another instrumentality or agency,



which in turn produces injury, he cannot escape liability by claiming that his negligence was not the proximate cause of the injury.

Watson on Damages for Personal Injuries,  
Section 65.

In the case at bar the defendant violated its legal obligation to furnish its servants with reasonably safe and suitable appliances by maintaining in use a defective cable, known by it to be defective, which caused it to have a tendency of climbing upon and slipping from the pulleys. It had actual knowledge that the cable, due to its defective condition, had left its position on the Saturday immediately prior to plaintiff's injuries. It further knew that in the event it came off the pulleys it would have to be replaced, and in the act of replacing some injury might occur. It further knew that in the absence of Akina, the regular foreman having charge of the superstructure of the conveyor, the plaintiff would attempt to replace it. By negligently maintaining in operation the cable in question it necessarily set in motion a human agency, to-wit plaintiff's act, which in turn concurred in producing the injury. The act of plaintiff in attempting to replace was the direct result of defendant's negligence, without which he would not have been called upon to engage in this hazardous work, and without which the injuries would not have happened. Plaintiff's act in replacing was not an *independent, unrelated* act, but was closely connected with, dependent upon, re-

lated to defendant's negligence, and made necessary by it.

The negligence of defendant produced or gave rise to a certain condition or consequence, to-wit: the cable was off the pulleys. The defendant was at least responsible for this, because the record shows that a suitable cable could and did not leave the pulleys at this part of the conveyor, because "there was nothing there to make it come off" (Rec., pp. 191-192). This condition or consequence, coupled with plaintiff's act, became in turn the cause of the injury. It would be sophistry to contend that while the negligence of defendant was directly responsible for one cause or condition, yet it should not be held liable for the agency set in motion by its own negligence, which ultimately resulted in injury. If such were the law it would afford the wrongdoer an opportunity of apportioning or qualifying his own wrong.

"It is equally true that no wrongdoer ought  
 "to be allowed to apportion or qualify his own  
 "wrong; and that as a loss has actually hap-  
 "pened while his own wrongful act was in force  
 "and operation he ought not be permitted to  
 "set up as a defense that there was a more im-  
 "mediate cause of the loss, if that cause was  
 "put into operation by his own wrongful act.  
 "To entitle such party to exemption he must  
 "not only show that the same result might have  
 "happened but that it must have happened if  
 "the act complained of had not been done."

*Baltimore Ry. Co. vs. Reaney*, 42 Md. 136.

See also: Baldwin on Personal Injuries, Sec. 13.

*Selleck vs. Ry. Co.*, 93 Mich. 375.

Is there any evidence in the record which shows or tends to show that if the defendant had provided a suitable cable the injuries would, or must have happened? On the contrary, it affirmatively appears that the injury would not have resulted if the defendant had fulfilled its legal obligation by furnishing a proper and suitable appliance. The testimony of the witnesses for plaintiff shows (although contradicted by defendant) that a proper and suitable cable would not and did not leave the pulleys at this point, prior to the occasions described by them. This was a question of fact solely within the province of the jury to determine.

There were two causes which co-operated in producing the injury. First, the negligence of defendant in causing the cable to come off the pulleys, and second, the act of plaintiff in attempting to remedy a consequence or condition caused by such negligence. Both of these acts were closely related, one being made necessary and caused by the other. The negligence of the defendant was the predominating, superior and efficient force, while plaintiff's act was dependent upon, incidental, and subordinate to the controlling agency of defendant.

“Where two or more causes co-operate to  
“produce the damage resulting from a legal in-



“jury, the proximate cause is the originating  
 “and efficient cause which sets the other causes  
 “in motion. The relation of cause and effect  
 “between the tortious act and the intervening  
 “agencies being shown, the same relation be-  
 “tween the primary wrong and the subsequent  
 “injuries is also established; the first wrongful  
 “act operating through a succession of circum-  
 “stances, each connected with and originating  
 “by the next preceding. Thus the primary  
 “cause may be the proximate cause of a disas-  
 “ter in the sense of nearness of causal relation,  
 “though it may operate through successive in-  
 “struments. It is not essential, therefore, for a  
 “plaintiff to show that an act claimed to have  
 “been the proximate cause of a certain result,  
 “was the only cause. It is sufficient, if it be  
 “established that the defendant’s act produced  
 “or *set in motion other agencies which in turn*  
 “*produced or contributed to the final result.*”

Watson on Damages for Personal Injuries,  
 Section 65.

“Although a defendant is not responsible for  
 “any events produced by *independent interven-*  
 “*ing circumstances which have no connection*  
 “*with the primary act*, if the intervening agen-  
 “cies are put in operation by the wrongful act  
 “of the defendant, the *injuries directly pro-*  
 “*duced by such agencies* are proximate conse-  
 “quences of the primary cause, though they  
 “may not have been contemplated or foreseen.”

*East Tenn. R. R. Co. vs. Lockhart*, 79 Ala.  
 315.

See also: *Columbus R. R. Co. vs. Newsome*,  
L. R. A. 1915 B., p. 1111.

Bishop on Non-Contract Law, Sec. 457.

*Pennsylvania R. Co. vs. Hammil* (N. J.), 24  
L. R. A. 535.

Of course if a new and independent force intervenes between the original act of negligence and the injury the causal connection is broken and no recovery may be had. An intervening efficient cause has been defined as

“A *new* and *independent* force which breaks  
“the causal connection between the original  
“wrong and the injury, and itself becomes the  
“direct and immediate, that is the proximate  
“cause of the injury.”

*Pullman Palace Car Co. vs. Laack*, 14 American  
Neg. Cas. 303; (s. c. 143 Ill. 242).

In the case at bar the test is, was there a *new*, independent force, disconnected from and unrelated to the original wrong and self operating, which broke the causal connection? We respectfully submit that the evidence fails to disclose such fact, either by inference or otherwise. On the contrary each act in the chain of circumstances ultimately resulting in injury was dependent upon, related to and induced by the preceding. The original wrong was the controlling agency, and without which the injuries would not have occurred. It was the primary cause which produced the damage. If the

cable had been in proper condition it would not have come off the pulleys. If it had not come off the pulleys there would, of course, have been no necessity of replacing it. Thus it was the cause, without which the injuries would not have been sustained.

“If the first cause was such that but for it  
“the injury would not have happened, the mas-  
“ter is liable.”

Thompson Com. Law of Neg. (2nd Ed.), Sec.  
56;

*Ohio Etc. Ry. Co. vs. Trowbridge*, 126 Ind.  
391, 395;

*Ring vs. Cohoes*, 77 N. Y. 83;

*Ehrgott vs. N. Y.*, 96 N. Y. 265, 283;

29 Cyc., p. 500;

*Selleck vs. Ry. Co.*, 93 Mich. 380, citing;

*Campbell vs. City of Stillwater*, 32 Minn. 310;

Thompson, Com. Law Neg., Vol. 4, Sec. 3857;

Baldwin Personal Injuries, Sec. 13.

## DOCTRINE OF FORESEEING RESULTS.

While it is a general rule in order to fix liability, it should appear that it should have reasonably been foreseen by the master that injurious results might result or flow from his act (1 Cooley on Torts (3rd Ed.) 124, 125; *Southside Pass. Co. vs. Trich*, 117



Pa. St. 390). It is not necessary in order to make him liable, that the particular injurious consequences and the precise manner of the infliction of the injuries should have been foreseen by the wrongdoer. It is sufficient if the wrongdoer *might*, by the exercise of ordinary care, have foreseen that *some* injury might result from his act.

*Heiting vs. Chicago R. R. Co.*,

Am. Ann. Cases, 1912 D, p. 451; (s. c. 252 Ill. 466; 96 N. E. 842);

Baldwin Personal Injuries, Sec. 15;

Thompson on Negligence (2nd Ed.), Sec. 59;

*The Pullman Palace Car Co. vs. Laack*, 143 Ill. 242;

*Miller vs. St. Louis Ry. Co.*, 90 Mo. 389.

We respectfully submit it is a reasonable inference from the evidence that the defendant should or might have foreseen that some injury might result from its negligence. This is especially so in view of the fact that the coal conveyor at this particular part thereof was absolutely unprotected by rail or platform, and at an elevation of twenty-five feet above the wharf below. That there was liability of injury is shown by the testimony of Akina, the foreman (Luna) who, when he noticed the jumping motion of the cable on the Saturday immediately preceding the injury, "grabbed hold of the boy and shoved him back" out of danger to a position of

safety. (Pr. Record, p. 102). This was a question for the jury. (Am. & Eng. Ency. Law (2nd. Ed.), p. 509).

*The nearest cause is not the proximate cause of a disaster, unless it is disconnected from and independent of the original wrong.*

The main contention of the defendant in this case is that its negligence, if any, is remote and that the proximate cause of the injury is to be attributed not to any negligence of which it might have been guilty, but to the act of plaintiff himself in attempting to replace the cable. It bases its contention upon the theory that after the engine had stopped and the cable brought to rest, it was lying inert on the conveyor and therefore incapable in such state of producing injury. In other words, when the engine was stopped and the cable brought to rest, all danger had ceased, and it was the act of plaintiff himself in attempting to replace which was the efficient and predominating cause of the injury. This is true in the sense that if the plaintiff had not attempted to replace, and had gone off and left his employment, the accident and injury would certainly not have happened. So if he had remained at home that day, or had never been born. But the defendant evidently loses sight of the fact that it should reasonably have been anticipated by it that Ward would not pursue such course, but on the contrary would attempt to replace the cable in the manner which he employed. But was Ward's act an

independent, unrelated, self operating force, which had no connection whatsoever with the act of the defendant? It is unquestionably true that plaintiff's act was possibly the more immediate cause or occasion of the injury, in point of time, yet as we will contend later in this brief, the jury were warranted in inferring from the evidence that the defective condition of the cable *was the prime factor* in causing it to finally leave its position and thus producing the injury. So therefore the question is not whether the attempt to replace was the more immediate cause and nearest in time to the disaster, but rather whether such act was induced by, subordinate to and dependent upon the superior negligence of the defendant.

“The act of the injured party may be the  
 “more immediate cause of the injury, yet if that  
 “be an act, which was as to him *reasonably in-*  
 “*duced by the prior misconduct of the defend-*  
 “*ant*, and without any concurring fault of the  
 “sufferer, that misconduct will be treated as  
 “the responsible and efficient cause of the dam-  
 “age.”

Sutherland on Damages (3rd Ed.), Sec. 39.

“The proximate cause is the efficient cause,  
 “the one that necessarily sets the other causes  
 “in operation. The causes that are merely inci-  
 “dental or instruments of a superior or con-  
 “trolling agency are not the proximate causes  
 “and the responsible ones, though they may be  
 “nearer in time to the result. *It is only when*



*“the causes are independent of each other that  
 “the nearest is, of course, to be charged with  
 “the disaster.”* L

*Insurance Co. vs. Boon*, 95 U. S. 117.

(8 Ency. Sup. Ct. U. S. Rep., p. 881).

“The question, therefore, when an injury is  
 “done, is whether there is any responsible per-  
 “son, who could, if he had chosen, have prevent-  
 “ed it, but who, either seeing the evil conse-  
 “quences or negligently refusing to see them, *has*  
 “*put into motion either negligently or intention-*  
 “*ally a series of material forces by which the in-*  
 “*jury is produced.* This is the basis of the dis-  
 “tinction between conditions and causes. We  
 “may concede that all the antecedents of a par-  
 “ticular event are conditions without which it  
 “could not exist; and that in view of one or an-  
 “other physical science, conditions not involving  
 “the human will are spoken of as causes. But  
 “except so far as these conditions are capable  
 “of being moulded by human agency, the law  
 “does not concern itself with them. Its object  
 “is to treat as causes only those conditions  
 “which it can reach, and it can reach those only  
 “by acting on a responsible human will. It  
 “knows no cause therefore except such a will;  
 “and the will, when thus responsible, and when  
 “acting on natural forces in such a way as  
 “through them to do a wrong, it treats as the  
 “cause of the wrong. As a legal proposition  
 “therefore we may consider it established that  
 “the fact that the plaintiff’s injury is preceded  
 “by several independent conditions does not

“relieve the person by whose negligence one of these antecedents has been produced from liability for such injury.”

Law of Negligence, Wharton (2nd Ed.), Sec. 85.

We respectfully take the liberty of again quoting from a decision of the Supreme Court of the United States, on the distinction between causes and conditions, which we claim bears an important part in determining the question before the Court:

“In a consideration of this subject it is important to note well the distinction between conditions and causes. If the intervening act upon which the defendant relies is a mere condition or occasion and not an efficient cause, he will be held liable. Hence it matters not how many causes have intervened; if the defendant’s act is still the efficient cause, he is liable for the injury. The test is: *Was it a new and independent force acting in and of itself in causing the injury and superseding the original wrong complained of so as to make it remote in the chain of causation*; although it may have remotely contributed to the injury as an occasion or a condition thereof.”

*Milwaukee Ry. Co. vs. Kellogg*, 94 U. S. 469.

The reasoning contained in the text above quoted may well be applied to the case under consideration. Was the act of plaintiff in attempting to replace “a new and *independent force* acting in and of itself” and “superseding the original wrong so as to make

it remote in the chain of causation"? Did the force employed by plaintiff "act in and of itself" or was it induced by the act of defendant? What was there in the act of plaintiff which superseded the original wrong so as to make it remote in the chain of causation? The whole transaction dovetails. A certain cause produced a certain consequence or condition which, in turn, became the cause of the injury.

It would be contrary to all principles of natural justice to hold that, although the defendant furnished a defective and unsuitable cable, which left its position by reason of such defect, thereby requiring it to be replaced, yet no recovery could be had because plaintiff failed to affirmatively show that such defective condition was the sole cause of its finally leaving the pulleys and producing the injuries.

"The law is a practical science, it has been said, and Courts should not indulge in subtleties as to causation that would defeat the claims of natural justice. They rather adopt the practical rule that the efficient and pre-dominating cause, when producing a given event or effect, though there may be subordinate and dependent causes in operation, must be looked to in determining the rights and liabilities of the parties concerned."

Watson on Damages Personal Injuries, Sec.

65.

In the case at bar, it was impossible for the plaintiff or any other human being to affirmatively



prove that the cable finally left its position solely by reason of its defective condition. But we respectfully contend it was not incumbent upon him to affirmatively prove such fact. An efficient, predominating cause having been found, the injurious results should be considered as consequences of the original wrong and proximate to it.

“The practical administration of justice prefers to disregard the intricacies of metaphysical distinctions and subtleties of causation and to hold that the injury as to natural and proximate cause and consequence is to be answered in accordance with common sense and common understanding.”

*Southern R. R. Co. vs. Webb*, 59 L. R. A. 111, 112.

The case just cited is a most instructive one and discusses at length the various elements of the law of proximate cause.

As will be observed in this brief, we have not deemed it necessary to burden the Court with a citation of a large number of cases, or a discussion of the particular facts thereof. Each case must necessarily be decided on its own facts. There is one case, however, the facts of which are analogous to the case at bar.

The plaintiff in that case was employed by defendant as a fireman on one of its locomotives, which was sent out in a defective condition, and while on the road got out of order. It was the duty

of the plaintiff to make emergency repairs while on the road. An examination disclosed that what was called the "eccentric" was broken. While engaged in making the necessary repairs the "straps" which fastened the "eccentric" to the axle broke and injured the plaintiff. The Supreme Court of Oklahoma held that the failure to inspect the engine before it was sent out from the roundhouse was the proximate cause of the injury. The Court said, p. 706:

"But in this case the repairs, under the  
 "circumstances, were made necessary by the  
 "negligence of the company, and enhanced the  
 "risk of injury. The intervention of the act  
 "of the plaintiff between the negligence of the  
 "company and the injury should have been  
 "anticipated. When the engine broke it became  
 "necessary to repair. The plaintiff could not go  
 "off and leave it. It should have been foreseen  
 "that he would attempt to remedy the defect  
 "and thereby incur the risk of injury. The  
 "defendant is charged with knowledge of the  
 "defect, and knowing the defect it must have  
 "known that some sort of injury was likely to  
 "result. It must have known that if nothing  
 "worse happened the shaft would break, and  
 "that it would become necessary to repair it,  
 "and thereby the risk of injury would be en-  
 "hanced. It is true, as argued by the defend-  
 "ant, the plaintiff could have gone off and left  
 "the engine, but it should have been so anticipat-  
 "ed that he would not do so, and that he would  
 "attempt to repair it just as he did."

*Chicago, R. I. & P. R. Co. vs. Moore*, 43 L. R. A. (N. S.) 701, 706.

The legal principles laid down in the Moore case, *supra*, and the facts upon which they are based, may readily be applied to the case at bar. In the Moore case, the failure to inspect was negligence. In the case at bar there was a defective cable, the maintenance of which by the defendant was negligence. In the Moore case the Court held that it might reasonably have been anticipated if a breakdown occurred the plaintiff would attempt to remedy the defect and thereby incur the risk of injury. In the case at bar the defendant might reasonably have anticipated that the cable would come off the pulleys, that plaintiff would attempt to replace it, thereby incurring the risk of injury. In the Moore case, it was not the "eccentric" which caused the injury, but the "straps". In the case at bar, it was the defective cable which first came off and then hurled the plaintiff to the wharf below. The Moore case simply applies the well-known rule that where the negligent act sets in motion another agency which in turn causes injury the original wrongdoer is responsible for all the injurious consequences, if the intervention of such agency could have reasonably been foreseen by him; and whether the intervention of such agency should have been foreseen is a question for the jury, under proper instructions from the Court.



“The practical solution of this question appears to us to be that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances, which in fact existed, whether they could have been ascertained by reasonable diligence or not, would have thought at the time of the negligent act reasonably possible to follow if they had been suggested to his mind.”

Vol. 1, Shearman & Redfield on Negligence (4th Ed.), Sec. 29.

The only qualification in the Moore case, and which was one of the grounds of the dissenting opinion of Mr. Justice Perry, when the case was first before the Supreme Court of Hawaii, on error from a judgment of nonsuit, was where the evidence showed that the servant was engaged for the particular purpose of making repairs. In such event he would be held to assume all risks, whether due to negligence or not. The very character of his employment would necessarily preclude recovery for injury sustained while engaged in repairing. But we respectfully submit a reasonable interpretation of the evidence in this case *does not bring the plaintiff within the terms of this exception*. He was employed by the defendant as a machinist in its machine shops (Rec., p. 149) and was only sent down to the coal conveyor when foreign coal ships came in (p. 151), and his principal employment on

such occasions was superintending a gang of laborers in the holds of discharging coal ships (Rec. 152). The operation of the coal conveyor was in charge of another man, to-wit, James Akina (Rec. 152), who made all necessary repairs thereon (Rec. 173). If the engines happened to get out of order, Mr. Gedge, the secretary and treasurer of defendant, would send for plaintiff and he would go down to the conveyor (Rec. 174). But the cable and the working thereof were directly in charge of Akina, and all repairs to and the installation of the cable were under Mr. Williamson, who was specially employed by the defendant for that purpose (Rec. 174-425).

*The replacing of the cable was not in the nature of a repair.* It was merely readjusting a defective and unsuitable appliance to its proper position, so that operations might be resumed. There was nothing relating thereto which required the exercise of mechanical skill. It was neither Ward's particular duty, nor was he specially employed to keep the cable in position; although if the regular foreman (Akina), in charge of the superstructure of the conveyor, happened to be elsewhere engaged thereon, the plaintiff might be called upon to replace the cable. Indeed, the fact that plaintiff made complaint to the proper official of the defendant on Saturday immediately prior to his injuries and received assurances that a new and suitable cable would be installed, negatives the position taken by Justice Perry in his dissenting opinion that plaintiff had assumed all

risks attendant upon the negligence of the defendant in failing to provide a suitable or proper appliance. It is neither a fair, just nor reasonable inference from the evidence in the case. Although the servant assumes the ordinary risks incident to his employment, yet he cannot be held in law to assume the risks of a defective appliance which the master has promised to remedy. The maintenance of such an appliance enhances the risk of injury, to which the servant would not be exposed if the master performs the obligation which the law imposes upon him. In the present case it was the legal obligation of defendant to provide its servants with reasonably suitable appliances. It failed in this duty, and such failure was negligence; and the jury were authorized to infer from this fact that such negligence was the efficient, predominate and proximate cause of the injuries sustained. As above quoted, "the law is a practical science, it has been said, and Courts rather adopt the practical rule that the efficient and predominating cause, when producing a given event or effect, though there may be subordinate or dependent causes in operation, must be looked to in determining the rights and liabilities of the parties concerned."

Watson on Damages, Sec. 65.

Suffice it to say, the plaintiff proved that it was the defective condition of the cable which caused it to leave its position, thereby requiring replacement. The defendant could, by the exercise of ordinary



care, have prevented this condition. A specific act of negligence having been proven, from which the jury could and did in fact find that the injuries resulted, it was neither incumbent upon nor necessary for plaintiff to prove that the injury might have happened from a non-defective cable. This was a matter of defense, and evidence was offered by the defendant which tended to prove this fact. So therefore it became a question of fact for the jury, and by their verdict they necessarily found that the cable left its position by reason of the negligence of the defendant, which could have been avoided by the exercise of ordinary care on its part. By their verdict the jury have necessarily answered this question in the negative.

**Was Plaintiff's Act in Replacing the Cause of the Injury, as Distinguished From a Condition or Incident Arising From the Negligence of Defendant.**

It may be conceded in a discussion of this question that the injury would probably not have occurred *if the plaintiff had not* tried to replace the cable. Neither would it have happened "if he had never been born, or had remained at home on the day of the injury. Yet no one would claim that his birth or his not remaining at home that day can, in any just or legal sense, be deemed a cause of the injury." (*Smithwick vs. Hall*, 59 Conn. 269.) Our inquiry should be directed then to the difference between causes and conditions. A cause is an originating force producing a certain condition or conse-

quence, or conditions or consequences, which naturally operate so as to produce an ultimate effect. Such effect does not always follow as an immediate result of the cause. It may operate through a succession of events, each of which produces certain consequences, depending upon and related to its immediate antecedent, but eventually finding bottom in the ultimate result or effect. It cannot be said that these various consequences, conditions or events can justly be termed causes, in the sense that they are originating forces. It is only when the chain of events is interrupted by the interposition of a new, independent, unrelated and self-operating force can it be legally said that the chain of causation has been broken and a new cause substituted. Where each separate act, condition or event is related to, connected with, dependent upon and made necessary by its immediate antecedent, we take it such acts, conditions or events are not causes in a legal sense which should be regarded as self-operating forces so as to relieve the author of the original wrong. They are to be regarded more in the nature of incidents or conditions which spring from the originating force, without which such incidents or conditions would have no existence. If this reasoning is sound, then it logically follows that plaintiff's act in replacing is to be considered more as an incident or condition, rather than a self-operating, distinct, independent, unrelated and efficient cause of the injuries. It makes no difference whether he employed physical force in attempting to remedy a condition made

necessary by an act of negligence, for the attempt was merely a condition or incident which had its origin in the defendant's fault.

### **Proximate Cause Is a Question For the Jury.**

As a general rule the proximate cause of an injury is ordinarily a question of fact for the jury to determine under proper instructions from the Court.

Thompson Comm. Law of Neg. (2nd Ed.),  
Sec. 161;

*Milwaukee R. R. Co. vs. Kellogg*, 94 U. S.  
469;

*Schumaker vs. St. Paul R. R. Co.*, 46 Minn.  
39, 42;

*Brown vs. Chicago R. R. Co.*, 54 Wis. 350-357;  
*Baltimore St. R. Co. vs. Kemp*, 61 Md. 619,  
622;

*Hays vs. Michigan R. R. Co.*, 111 U. S. 229,  
232;

1 Cooley on Torts (3rd Ed.) p. 111;

Sedgwick on Damages (9th Ed.), Vol. 1, Sec.  
116;

*The Pullman Palace Car Co. vs. Laack*, 143  
Ill. 242;

(s. c. 14 American Neg. Cases, 303.)

“It is not a question of science or of legal  
“knowledge. It is to be determined as a fact,  
“in view of the circumstances of fact attend-  
“ing it.”

*Milwaukee R. R. Co. vs. Kellogg*, 94 U. S. 469.



**The Jury Could and Did in Fact Find From the Evidence That the Defective Condition of the Cable Was the Proximate Cause of the Injuries.**

Mr. Labatt, in his work on Master and Servant (Vol. 2, Sec. 805), states the rule as follows:

“Whether the breach of duty established in a  
 “given case was the proximate cause of the  
 “injuries is a mixed question of law and fact.  
 “It is primarily for the jury to determine under  
 “proper instructions. A Court will not under-  
 “take to settle it in any case where it involves  
 “the *weighing of conflicting evidence* \* \* \*  
 “*the balancing of probabilities, and the drawing*  
 “*of inferences.*”

In the case at bar it was shown that the cable was defective: that it left its position by reason of such fact, having a tendency to “climb” on the pulleys. Therefore, the jury were at least warranted in inferring that the cable, due to its defective condition, came off the pulleys while it was running. There being no reasonable explanation why the cable finally left the pulleys, it is reasonable that the jury could have inferred that it finally left its position on account of and due to its defective condition. Could not the jury have found from the fact that the wires were “sticking out” at different lengths from a sixteenth of an inch to an inch, it would have a tendency to and did in fact slip while the attempt of replacing was being made? Would not the jury have been warranted in drawing the inference that, as the evidence showed, the cable had a tendency to

slip from the pulleys while in motion, it was probable that this tendency would obtain while at rest, due in all probability to the wires which projected, thus preventing the cable from maintaining the snug position around the pulleys which a proper and suitable cable would have had? Could not the jury have inferred that a cable in the condition as described by plaintiff's witnesses would be more readily dislodged while being replaced? These, we submit, were legitimate inferences which could have been drawn from the facts and surrounding circumstances, and were not matters of speculation or conjecture. The evidence is such that honest minds could draw different conclusions therefrom. If this is so, then the final "coming off" of the cable involved "a balancing of probabilities or a drawing of inferences" which was solely within the province of the jury to determine as matter of fact.

"Where from facts properly in evidence  
 "negligence may be inferred as a conclusion of  
 "fact, it is distinctly the function of the jury  
 "to draw such inference, and the question of  
 "negligence must be left to their determina-  
 "tion."

21 Am. & Eng. Ency. Law (2nd Ed.), p. 507.

**Ward Was Not Guilty of Contributory Negligence, Nor Was Contributory Negligence the Proximate Cause of the Injuries.**

These questions are so closely related that a discussion of one necessarily includes the other, so

therefore we will endeavor to treat them conjunctively.

The law imposes upon the servant the obligation of exercising ordinary care and prudence in the performance of his work. It does not hold him to an exercise of unusual or extraordinary care. There is no fixed standard by which ordinary care may be judged, so therefore the policy of the law has relegated the determination of this question to the jury, under proper instructions from the Court. It is their particular province to note the special circumstances and surroundings of each particular case, and they say whether the conduct of the parties was such as to be expected of reasonably prudent men.

*Grand Trunk R. Co. vs. Ives*, 144 U. S. 408, 417.

It is only when the evidence is such that all reasonable men must draw the same conclusions therefrom that it becomes a matter of law for the Court. If the evidence is contradictory or involves conflicting theories, or the exercise of judgment or discretion, then the question is one for the jury.

The defendant contended that if Ward had lifted the weight prior to attempting to replace the cable all tension would be taken therefrom, and it could have been replaced with perfect safety. By failing to adopt this method, Ward was guilty of contributory negligence, which was the proximate cause of



his injuries. In other words, if he had adopted a method which was *absolutely* safe, the injuries would not have happened. If the plaintiff's conduct is to be judged by this standard, then the law would not impose upon him an obligation to exercise ordinary, but extraordinary care and prudence, to save himself from injury. Such contention has no foundation either in law or reason. If the law obliged the servant to exercise such a high degree of care, then it would logically follow that no accident would ever happen.

On the other hand, the evidence for plaintiff shows that he was not guilty of such contributory negligence as would bar recovery, or in fact of any contributory negligence whatsoever. At all events, his conduct at the time of his injuries was such that honest men might have differed in their conclusions as to his exercise or lack of care under the circumstances. His conduct was such as to call for the exercise of judgment or discretion, and it was for the jury to say whether he employed a method which an ordinarily prudent person would have adopted if he had been placed in the same position.

The evidence of the witnesses for the plaintiff shows that there was no necessity for raising the weight, because in their judgment and experience there was sufficient slack to replace without so doing (Rec., p. 72). The only slack necessary was two or three inches (Rec., p. 74). See also: Ward's testimony (Rec., p. 186). The evidence further

shows that the slack obtained on the Saturday immediately prior to the injuries was from the momentum of the cars, and not by lifting the weight (Rec., p. 104). On this occasion the cable had come off the pulleys to the extent of one-half the circular head. Yet, even then the raising of the weight afforded no slack, for after the cable was replaced it was observed that "the slack was still at the weight" (Rec. pp. 68, 89, 103). This testimony tended to prove that the raising of the weight had little or no effect as to slack at the scene of the injury. The evidence furthermore shows affirmatively that lifting the weight would give no slack at the scene of the injuries (Rec., p. 114). The only purpose of raising the weight was to have the cable in position so that it might be hauled around the entire conveyor, in the event it *became necessary to obtain that amount of slack* (Rec., p. 137). In others words, it was simply a preliminary operation, so if that amount of slack was required this work would have already been done. By no just or reasonable interpretation of the evidence may it be inferred that the mere raising of the weight afforded or produced slack at the scene of the injuries. At least such was the contention of the plaintiff, although controverted by the defendant. To raise the weight and haul the cable around the conveyor would take about two hours (Rec., p. 189). This was necessary only on one or two occasions when a car was derailed at the curve leading to the coal yard, and due to a broken grip and coal on the

tracks (Rec., 270-271), and occurred only two or three times during plaintiff's employment at the conveyor (Rec., p. 267).

The defendant also produced evidence of certain experiments, which were offered in support of its theory. Although interesting, perhaps, they afforded no fair test, because the machinery and motive power were different, as was also the style and make of the cable (Rec., p. 727), the difference between which was fully explained by plaintiff (Rec., pp. 727-728). This was matter of defense of which the jury was fully advised. At all events, there was a substantial conflict in the evidence. The jury, by their verdict, have held that the plaintiff during his attempt to replace the cable was exercising ordinary care. If this is so, then he could not be guilty of contributory negligence. If he was not guilty of contributory negligence, then how in reason or common sense could his act be the proximate cause of his injuries? The jury must have found that the injuries were caused by the negligence of someone, in view of the evidence in the case. If the plaintiff did not directly and proximately contribute thereto (and the jury have so found by their verdict), then the only remaining solution is that the negligence of the defendant was the direct and proximate cause of the damage.

Contributory negligence is a question of fact for the jury.

*Hough vs. Texas R. R. Co.*, 100 U. S. 213;



*Cain vs. Northern Ry. Co.*, 128 U. S. 94, 95;  
*Great Northern Ry. Co. vs. Thompson*, 118  
 C. C. A. 79.

As was also the question whether plaintiff's act was the efficient cause of the injuries.

1 Labatt, Master & Servant, Sec. 798.

The burden of proving contributory negligence was upon the defendant.

*R. R. Co. vs. Gladmon*, 15 Wall. 401;  
*Indianapolis R. Co. vs. Horst*, 93 U. S. 291;  
*Union Pac. R. Co. vs. O'Brien*, 161 U. S. 451.

**The Plaintiff Did Not Assume All or Any Risks of the Employment Which Resulted in the Injuries.**

In consideration of this subject, it perhaps becomes material to ascertain the character of plaintiff's employment at the conveyor, all risks of which the defendant claims he assumed. The evidence shows that he had been a foreman at the conveyor at intermittent periods from the time it was erected, about five years prior to his injuries. The steel work was erected by him in accordance with plans, specifications and blue prints furnished by the defendant (Rec., p. 150). His main employment was in the machine shops of defendant (Rec., p. 149), but when a foreign coal boat arrived the secretary and treasurer of defendant "would send for him to go down to the conveyor" (Rec., p. 150), where his main employment was "bossing the men on the

ship'' so that the coal might be expeditiously handled (Rec., p. 152). The coal conveyor (upon which the cable in question was in operation) was under the direct charge of another foreman, viz, James Akina (Rec., p. 152). All the men employed on the top of the conveyor were subject to the orders of the secretary and treasurer of defendant, as was likewise the plaintiff (Rec., p. 153).

In the event repairs were necessary on the conveyor, the same were made by Akina, the regular foreman thereof (Rec., p. 173), but if the engines happened to get out of order plaintiff was sent for to repair the same (Rec., p. 174). Plaintiff had nothing to do with the cable or the installation thereof, that part of the mechanism having been placed in charge of a man specially employed for such purpose (Rec., p. 172).

The general rule is when the servant continues in his employment with knowledge of a defective appliance, he cannot recover if he is injured thereby. But if he makes complaint thereof to the master, and is assured that the defect will be remedied, and he continues in his employment in reliance upon such promise, he may recover for injuries received within a reasonable time necessary for a repair of the defect, unless the danger is so imminent that no reasonably prudent man would continue in the service.

The evidence shows that the defective condition of the cable was first called to defendant's attention about a month prior to the injuries. It moreover shows that on the Saturday immediately prior to the injuries the defendant was again advised of such condition, and (although denied by it) promised plaintiff to install a new cable (Rec., p. 178), and Ward continued in his employment in reliance upon such promise (Rec., p. 179). The promise to install a new cable was a confession of a breach of duty on defendant's part. (*McFarlane Co. vs. Potter*, 153 Ind. 107.) Its duty in this respect was manifest and imperative, and its assurances remove all ground for the argument that plaintiff, by continuing in the employment, was either guilty of contributory negligence or had engaged to assume the risk.

*Hough vs. Texas R. R. Co.*, 100 U. S. 225;

*Nealy vs. Oil Co.*, 64 L. R. A. 145.

Counsel seek to avoid the legal effect of plaintiff's complaint and defendant's promise to remedy by claiming that such promise was made "with respect to the efficiency of the work and not with respect to the safety of the workmen," and "did not relieve Ward, as a matter of law, from his assumption of the risks connected with replacing it( the cable) on the pulleys". The answer to this argument is:

WHY DID WARD CONTINUE IN HIS EMPLOYMENT AFTER THE PROMISE WAS



MADE? Is it a fair inference from the evidence that the inducement offered was simply that the work might be expeditiously carried on? His testimony shows that the reason why he continued in the employment was, if Akina, the luna or foreman of the upper part of the conveyor, were not present, he would be obliged to replace the cable at a portion of the conveyor which counsel admit was dangerous. We submit it makes no difference whether or not Ward pointed out the dangers to Gedge when the complaint was made. He was under no obligation, legal or otherwise, to specifically call the defendant's attention thereto. They were just as apparent to Gedge as they were to Ward, or, at all events, they could have been observed or foreseen by defendant by the exercise of ordinary care and prudence.

It was for the jury to say, under proper instructions, whether any danger was to be apprehended either from the cable or its continued use. It was also for the jury to say whether the inducing motive of Ward's continuance in the employment was his reliance upon the promise that such dangerous condition would be remedied, by the installation of a proper and suitable cable. It was moreover a question of fact whether the defendant should not have foreseen that injury of some kind might result by continuing the use of the cable in question. It would indeed be a novel doctrine to hold that when the servant has complained, and the master prom-

ised to remedy, such complaint and promise must be regarded merely with respect to efficiency of the work and not dangers, if the servant fails to specifically point out dangers which may be just as apparent to the master.

“If it is a reasonable inference from the  
 “testimony that the inducing motive of the  
 “servant’s continuance in the employment was  
 “his reliance upon a promise that the dangerous  
 “conditions would be remedied, the mere fact  
 “that the servant knew of and appreciated the  
 “abnormal risk which caused his injury will  
 “not warrant a Court in declaring that his  
 “continuance in the employment rendered him  
 “chargeable as a matter of law with an assumption of that risk, or with contributory negligence.”

1 Labatt, Master & Servant, Art. 423, p. 1193.

In his contract of service the plaintiff engaged to assume the ordinary risks incidental to the employment. On the other hand, the master undertook to provide for his use the means and appliances which the service required for its efficient and safe performance; and the plaintiff did not assume the risk dangers due to a defective appliance, against which the defendant had, in its contract, impliedly undertaken to protect him.

*Northern Pac. Ry. Co. vs. Herbert*, 116 U. S. 642, 648;

*Hough vs. Ry Co.*, 100 U. S. 213;

*Wabash R. Co. vs. McDaniels*, 107 U. S. 454;

*Chicago R. Co. vs. Ross*, 112 U. S. 377.

The Supreme Court of Hawaii held, when the case was first before that Court on error, that the failure to platform and rail the conveyor at the scene of the injury was one of the ordinary risks of plaintiff's employment, and necessarily assumed by him. This is correct in the sense if the injuries had resulted solely and exclusively from such failure the plaintiff could not recover. In other words, if the defendant had committed no other negligent act than to permit the scene of the injuries to remain without platform or rail, and *by virtue of this fact alone* plaintiff had been injured, then no liability would have attached, because such condition would be the moving *cause* of the injuries. But the failure to platform and rail was not the cause of the injuries. It was merely an incident or condition which possibly aggravated the same. It is, however, impossible for anyone to say whether the plaintiff would not have received just as severe injuries if there had been a platform and rail. At all events, the direct and proximate cause of the injuries was not the lack of platform and rail, but a distinct and separate instrumentality, to-wit, the defective cable. If it had not been defective it would not have left the pulleys, and plaintiff would not have been obliged to leave his employment in the ship's hold to replace it. By continuing in operation a defective cable, known by it to be defective, the defendant created



additional hazards and dangers, not incidental to the employment, which materially increased the risk of injury. Counsel in their brief contend that because Ward was the foreman of the conveyor and therefore charged with the duty of keeping the same in operation, he necessarily assumed the risk of replacing the cable. In other words, the replacing of the cable was incidental to his employment, whether caused by negligence or not. His assumption of the risk in this respect was no greater than any other mechanic whose duty was to operate his employer's machinery. The mere fact that he was a foreman does not relieve the defendant of the legal duty it owed to exercise ordinary care. The relation of master and servant existed between them, and the defendant owed him the same legal duties as it did to any other of its employees.

The servant does not assume dangers caused by the failure to exercise ordinary care.

*George vs. Clark*, 85 Fed. 608;

*Labatt, Master & Servant*, Vol. 3 (latest Ed.),  
Sec. 1178.

Increased dangers caused by negligence of the employer are not to be deemed incident to the employment.

*Anglin vs. Texas R. R. Co.*, 60 Fed. 553;

*Rogers vs. Leyden*, 127 Ind. 50.

It is only those risks alone which cannot be obvi-

ated by the adoption of reasonable measures of precaution by the master that the servant assumes.

*Pantzar vs. Mining Co.*, 99 N. Y. 368.

See also :

*McGovern vs. R. Co.*, 123 N. Y. 280;

*Harrison vs. R. Co.*, 31 N. J. L. 293.

We respectfully submit that by no reasonable interpretation of the evidence can it be said that plaintiff, under the facts and circumstances of this case, assumed the risk of the failure of defendant to adopt reasonable measures of precaution to protect him from injury; and especially so in view of plaintiff's complaint, defendant's promise to install a new cable, and his continuance in the service in reliance thereof.

We respectfully pray that the judgment of the Supreme Court of Hawaii be affirmed, with costs.

E. A. DOUTHITT,  
*Attorney for Defendant in Error.*





(No. 2617)

---

# United States Circuit Court of Appeals

FOR THE  
NINTH CIRCUIT

INTER-ISLAND STEAM  
NAVIGATION COMPANY  
LIMITED, a Hawaiian  
corporation,

Defendant, Plaintiff in Error,  
vs.

GEORGE E. WARD,  
Plaintiff, Defendant in Error.

In Error to the  
Supreme Court of  
Hawaii.

---

## BRIEF FOR PLAINTIFF IN ERROR.

---

W. O. SMITH,  
L. J. WARREN,  
E. W. SUTTON,  
HENRY HOLMES,  
C. H. OLSON,  
*Attorneys for Plaintiff in Error.*

---

Filed this.....day of ....., 19....

F. D. MONCKTON, Clerk.

By.....Deputy Clerk.

---

F. D. Monckton,  
Clerk.



# United States Circuit Court of Appeals

FOR THE  
NINTH CIRCUIT

(No. 2617)

INTER-ISLAND STEAM  
NAVIGATION COMPANY  
LIMITED, a Hawaiian

corporation,

Defendant, Plaintiff in Error,

vs.

GEORGE E. WARD,

Plaintiff, Defendant in Error.

In Error to the  
Supreme Court of  
Hawaii.

## BRIEF FOR PLAINTIFF IN ERROR.

### *Statement of the Case.*

This case comes to this Court by writ of error to the Supreme Court of the Territory of Hawaii, jurisdiction in this regard having been conferred upon the Court of Appeals by the Act of Congress of January 28, 1915 (Public. 241-63d Congress), an act amending Sections 128, 238 and 246 of "An Act to Codify, Revise and Amend the Laws Relating to the Judiciary," approved March 3, 1911.

The action was originally instituted on March 10, 1913, in the Circuit Court of the first Judicial Circuit of the Territory of Hawaii, by the filing of a complaint wherein George E. Ward, the defendant in error, was plaintiff and the Inter-Island Steam Navigation Company, Limited, the plaintiff in error, was defendant.

Briefly stated the complaint alleged that Ward was employed by the Inter-Island Steam Navigation Company, Limited, here-



inafter referred to as the "Company," in the capacity of machinist and engineer and as foreman of the coal conveyor operated by the Company, situated on Honolulu Harbor; that the Company negligently permitted and kept in use on the coal conveyor a steel cable which had become worn and frayed by reason of which condition it was unsafe and dangerous; that this cable, by reason of its worn condition, slipped from its position on the pulleys at the end of the conveyor which jutted out into the harbor and that while Ward was endeavoring to restore the cable to its proper position on the pulleys and without negligence on his part the cable slipped, struck and hurled him to the wharf below, a distance of from twenty to thirty feet, and that by his fall Ward suffered certain injuries and was permanently crippled. The complaint also alleged the negligence of the Company in failing to provide a suitable guard rail or platform at the end of the conveyor where the accident occurred so that reasonable protection might be afforded those working at that particular point. Damages in the sum of \$50,000 were claimed on account of the injuries sustained. The date of the accident was alleged to be July 8, 1912.

The defendant Company having filed a general denial, the action came on for trial before the First Judge of the First Circuit Court of the Territory of Hawaii and a jury. At the conclusion of the plaintiff's case the defendant Company moved for a non-suit on the following grounds.

That the plaintiff failed to show that the defendant Company was guilty of negligence as charged or at all.

That the proximate cause of the injury to plaintiff was his own act.

That the evidence showed plaintiff to be guilty of negligence which not only contributed to the accident, but without which it could not have occurred and that the evidence showed that the plaintiff assumed all risks of the employment which resulted in the accident.

The motion for a non-suit having been granted the plaintiff sued out a writ of error from the Supreme Court of Hawaii

with the result that the judgment of non-suit was held erroneous and the case sent back for a new trial. This decision of the Supreme Court of Hawaii is found in Volume 22 of Hawaiian Reports, page 66, et seq. (Tr. pp. 16-33.)

Following this decision a second trial of the case was had before the First Circuit Court and a jury, the defendant Company, as in the first trial, moving for a judgment of non-suit at the conclusion of the plaintiff's case on the grounds above enumerated. (Tr. p. 310.) This motion having been denied by the trial Judge because of the previous decision of the Supreme Court, the defendant put on its case. The defendant requested the Court to instruct the jury to find in its favor, and this having been denied, the case went to the jury, resulting in a verdict in favor of the plaintiff in the sum of \$13,000. The defendant Company excepted to the verdict as contrary to the law and the evidence and moved for a new trial which was denied. Judgment was entered in favor of the plaintiff in the sum of \$13,097.20.

The defendant Company thereupon took the case to the Supreme Court of Hawaii by writ of error, the main errors assigned being the denial of its motion for non-suit, the refusal of the trial court to instruct the jury to find in its favor, the rendering of the verdict, the denial of its motion for a new trial and the entering of judgment against the defendant Company and in favor of plaintiff in the sum of \$13,097.20.

In addition to these errors certain others were assigned relating to the admission of evidence and the giving and refusing of certain instructions, but as these have not been assigned as errors in the present proceeding they will not be enumerated.

On March 24, 1915, the Supreme Court of Hawaii rendered its decision on the writ of error holding that no error had been committed. The decision is reported in Volume 22 of the Hawaiian Reports, page 488 et seq. (Tr. pp. 767-793.) On April 7, 1915, judgment was entered in the Supreme Court of Hawaii, pursuant to the decision, affirming the judgment of



the First Circuit Court of the Territory of Hawaii. Immediately thereafter the present writ of error was sued out.

In order that the questions presented by the assignments of error may be clearly understood we shall, before stating them, give a brief description of the place where the accident occurred, of the mechanical appliances of the coal conveyor which were involved in the accident, Ward's relation to the work being carried on, and the manner in which he was injured. In the record and likewise in this brief the words "Mauka," "Makai," "Ewa" and "Waikiki" will be found. These words are used to denote directions—Mauka meaning toward the mountains, which lie to the East; Makai meaning toward the sea, which is the west, and Ewa and Waikiki being the names of places, Ewa being on the North and Waikiki on the South.

### *The Coal Conveyor.*

The coal conveyor upon which the accident occurred resembles a railroad trestle built in the shape of the letter "L," one end extending some six or seven hundred feet into the harbor of Honolulu, upon a wharf at which vessels lie; the other end of the "L" extending along the shore about the same distance to a yard where the coal is dumped and stored. Upon this trestle, which is some twenty-five feet above the wharf and a similar height above the ground, are laid two parallel steel tracks upon which run small coal cars. These parallel tracks meet at the ends of the trestle, in nearly perfect circles. The coal cars are drawn from one end of the conveyor to the other end and back by means of an endless steel cable about twenty-eight hundred feet long and three-quarters of an inch in diameter. (Tr. pp. 100, 156.)

The power plant for operating the steel cable is located upon the wharf below the trestle, about equidistant from the shore and the end of the wharf, and consisted, at the time of the accident, of a steam engine operating a drum around which the steel cable is wound four times. (Tr. pp. 52, 111, 162.)





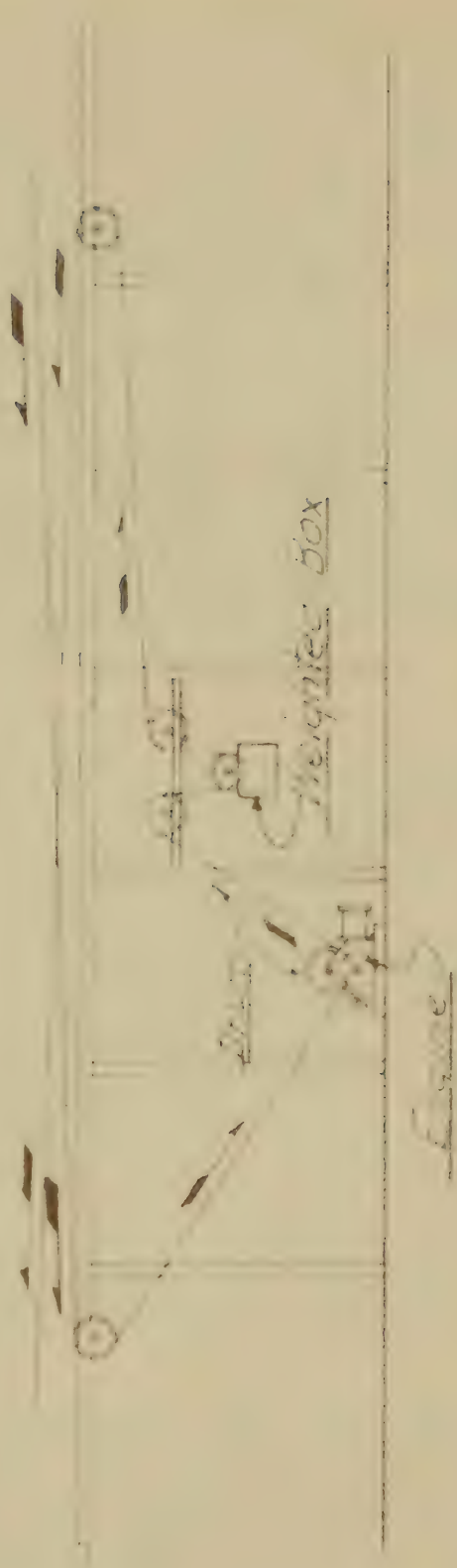


FIGURE No. 1

### *The Weighted Box.*

Between the drum around which the cable is wound and the track on the trestle above, there is suspended on the cable, by means of pulleys or sheaves, a weighted box. (Tr. pp. 51, 112.) This box with its weight is the most vital appliance on the conveyor in relation to the accident to the plaintiff *for had it been lifted*—provision for which was made—*Ward would not have been injured.* The accompanying illustration (Figure 1) shows the location of the weighted box in relation to the engine and drum. Without the tension or “purchase” which is produced by this weight the cable would slip where it is wound around the drum. (Tr. pp. 162-165.) The weight keeps the cable drawn tight at all times and takes up all the slack in the cable not only at the drum, but throughout its length. The arrows in the illustration indicate the direction in which the cable is propelled by the engine and drum so that it is clear that as the cable is unwound from the drum the weighted box takes up whatever slack there is in the cable in the same way in which slack on a windlass has to be taken in and tension maintained on the rope being hauled in, in order to prevent the rope slipping on the windlass. As this steel cable is endless the weighted box takes in the slack not only from the drum but from the opposite side as well. In this way slack in the cable is taken up immediately and the cable is kept taut or under strain throughout its length. Ward described this weight as “an automatic means for taking slack from the drum.” (Tr. pp. 48-49.) At the curves and circular ends of the conveyor the weight makes the cable “hug” the pulleys and thus it is kept in the middle of the track. When the cable, from any cause, slips off one or more pulleys at these curved places in the track, the effect of the weight is to make the cable assume a straight line between the pulleys on which it still remains in place.



Provision is made on the coal conveyor whereby when the cable comes out of position on the pulleys it may be restored to its position around the pulleys *without difficulty and without danger*. The weighted box, which has just been described, and whose function is to keep the cable taut, may be lifted off the cable by means of a block and tackle, which was always in position and ready for use, and thereby all tension on the cable is removed and the cable may be replaced on the pulleys by hand, without difficulty (Tr. pp. 55-56, 67-68, 70-71, 81, 102). As Ward's injury occurred when he attempted to pry the cable into position *without having first lifted the weight* the importance of this point is evident. This point will be discussed at length later.

### *The Steel Cable.*

After the cable passes from the drum past the weighted box, it goes up upon the trestle between the rails on the South or Waikiki side of the trestle. From this point the cable goes between the rails of this track towards the shore and then turns south to the coal dumping yard. Here the cable follows the curve in the track, goes around the end of the conveyor, starts back between the rails of the opposite track, and comes back to the curve at the shore end of the wharf upon which part of the conveyor is located. Thence the cable goes west between the rails of this track, passing over the place where the drum, engine and weighted box are located, to the harbor end of the conveyor, thence around this curve and thence shoreward again to a point one hundred feet beyond the place where the cable came up to the track from the weighted box. There it goes down to the drum (Tr. pp. 51, 110-112).

The accompanying illustration (Figure 2) shows the route followed by the cable more clearly than words can describe it, the view being taken from above looking down upon the conveyor.

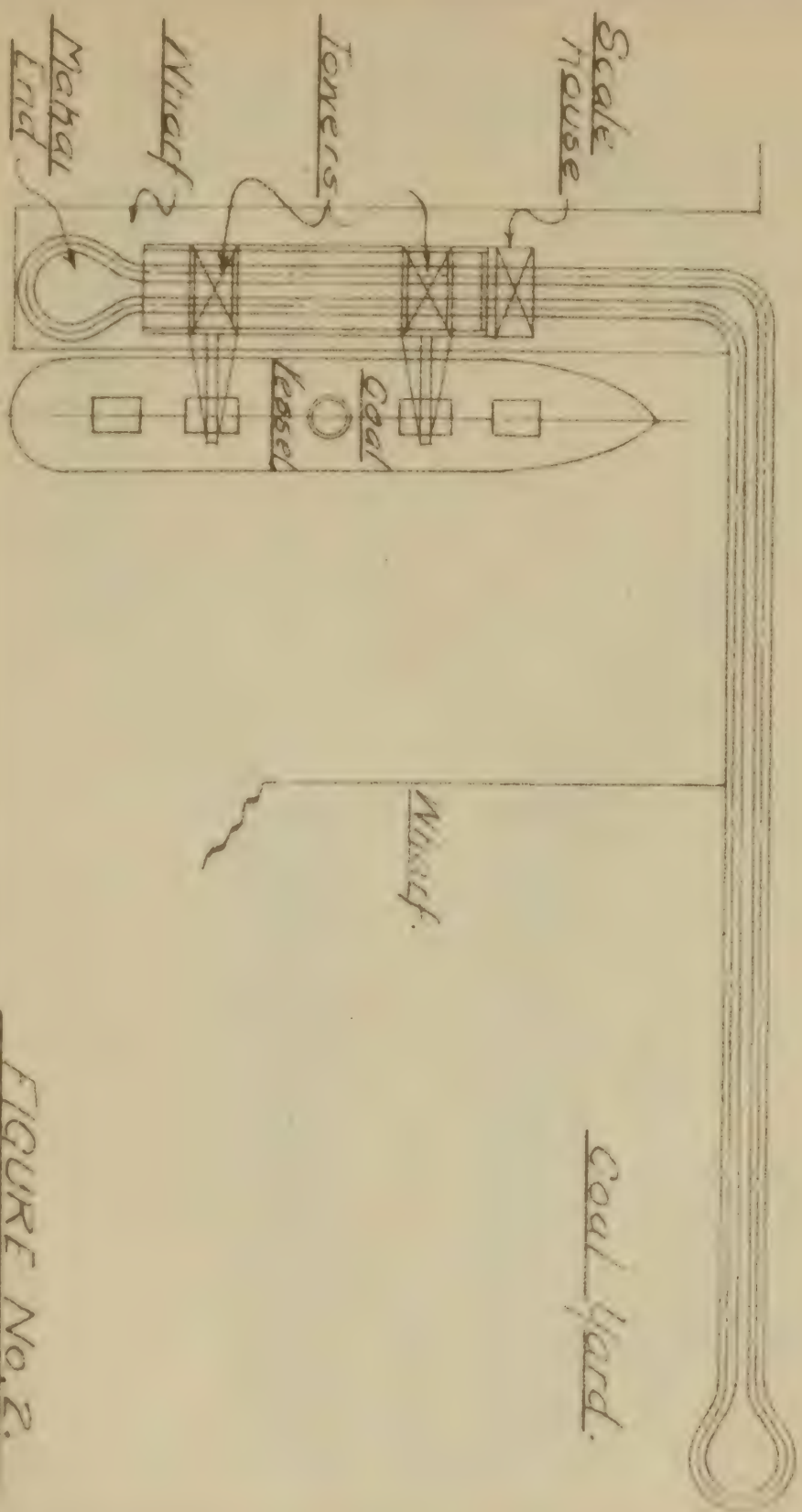


FIGURE No. 2.





In the straight parts of the track the cable is supported at intervals of about twenty feet by horizontal rollers or "dollies" (Tr. pp. 238-239.) These dollies are sunk into the track, only about two inches projecting above the level of the ties upon which the steel rails are laid. Defendant's Exhibit 7 shows one of these dollies with the groove worn in it by the steel cable.

At all of the curves in the track the cable is kept in position midway between the rails upon which the cars run by means of upright pulleys, having a flange at the lower side, defendant's exhibit 5 being one of these pulleys, showing the groove worn in it by the cable (Tr. pp. 47, 51-52, 58-59) (See also Figure 3).

At the curved end of the conveyor at the outer end of the wharf there are approximately sixty of these pulleys, the cable running on the side of the pulleys nearer the outer part of the circle. For a short distance at each end of the curve the cable has to turn gradually back into a straight line. To confine the cable in the middle of the track at these two points there are two series of eight pulleys, the cable on these eight pulleys being on the side of the pulleys next to the inside track (Tr. pp. 47, 51-52).

The accompanying illustration (Figure 3) shows the position of the cable both on the sixty pulleys and on the two series of eight pulleys at the ends of the curves.

As we have already stated small coal cars run upon these tracks drawn by the cable, being attached thereto by grips similar to the grips employed on cable cars. These grips consist of a long grooved "shoe" or slot swung underneath the car, the cable sliding through this groove while the cars are standing still and being gripped in this slot as in a vise when the car is to be moved.

In the straight parts of the track the horizontal dollies above referred to are lower than the bottom of the grip so that the

grip does not touch the horizontal pulleys as the car passes over them. On the curves, however, the grip passes around the pulleys coming in contact with one after the other. The grip is attached to the car in such a manner that when the strain of the cable brings to bear on the car the forward end of the grip rises somewhat while the rear end of the grip is correspondingly depressed. The result is that as the car passes around the curve the forward end of the grip, as it comes in contact with each pulley, makes each pulley rise slightly and the depression of the after end of the grip tends to make the pulleys drop back to their normal position.

The system which we have attempted to describe, is that which has been installed in many different places by the C. K. Hunt Company, and is in general use.

#### *Operation of Conveyor.*

When the conveyor is in operation in unloading coal vessels and dumping the coal obtained therefrom in the coal yard, the operation is briefly as follows:

On a track, elevated about ten or twelve feet above, but separate from the one we have described, are located two large movable towers, each having independent power appliances. These towers are placed in such positions that coal buckets may be dropped into the hatches of the vessel to be unloaded from long arms or booms extending out from the towers over the vessel lying at the wharf. The bucket from this tower is lowered into the hatch and filled with coal in the hold of the ship. Then the bucket is hauled up to the boom on the tower, brought in to the tower and the coal dumped into a hopper (Tr. pp. 49, 76, 153-154).

One of the twenty coal cars is then shoved into position beneath the hopper, filled with coal, gripped to the cable and started on its way to the dumping yard, stopping at the scale house to weigh the load and change the grip on the car to another part

of the cable, as at this point the cable goes down to the engine and drum, through the sheaves on the weighted box and up to the track at a point about 100 feet back of where it went down—so that for this distance two parts of the cable run next each other in the same direction (see Figure 1). At the dumping yard an automatic device opens the sides of the coal car permitting the coal to fall out, and the empty car then continues its course, without stopping, back to the place at which it was filled with coal. The same thing is performed at the other hopper, loaded coal cars during the operation being continually going down the one track to the dumping yard and empty cars coming back on the other (Tr. pp. 51, 157-159).

#### *Condition of the Cable.*

The cable in use at the time of the accident was alleged to have become worn to such an extent that it was unfit for use and dangerous and unsafe, and in fact the only allegation of negligence on the part of the defendant company was its permitting this cable to remain in use on the conveyor. It is true that the cable was somewhat worn and roughened on the outside, but its strength was not questioned and there is nothing in the evidence which tends in the slightest degree to indicate that it was not sufficiently strong to meet all of the requirements of its use, and moreover *it did not break*. The reason that the continued use of the cable was alleged as negligence is not because of injury occurring from the cable itself—but because the cable came out of its position on a few pulleys and *this created the occasion for Ward's going to the place* where it came off for the purpose of replacing it. Taking all of the plaintiff's evidence as true regarding the condition of the cable, all that this shows is that the cable was worn to such an extent that wires on its outside surface had broken and stuck out, and that this condition gave the cable a tendency to rise on the pulleys and *possibly* this caused the cable to come off. The defendant Company claimed that this did not constitute negligence on their part and in any



event did not make the accident, *which happened after this condition had ceased to operate*, the proximate result of this condition.

*Ward's Connection with the Conveyor.*

George Ward, the plaintiff in the action, was in the employ of the defendant Company at the time that the coal conveyor was erected, some five years ago, he being in charge of the erection and installation of all of the steel work, including the tracks upon which the coal cars run, the pulleys and dollies which keep the cable in position, the engine and drum for operating the cable, the weighted box and the sheaves or pulleys in connection therewith, as well as the steel mechanical appliances in the towers (Tr. pp. 149-150, 214-215). He knew of the weighted box, its purpose and the result of raising the weight on the tautness of the cable (Tr. pp. 53, 111-112, 310). He had been foreman of the coal conveyor practically all of the time from the date when the conveyor was constructed up to the time of his accident, whenever foreign coal ships were being unloaded, as was the case at the time of the accident in which he was injured (Tr. pp. 117-118, 216). He also knew that during all of this time there had never been any guard rail or platform at the circular ends of the conveyor.

*Promise to Replace Cable.*

To avoid the application of the doctrine of assumption of risk, which would prevent any recovery, Ward testified that on the Saturday preceding the Monday on which the accident occurred he had told Mr. Gedge, the Secretary of the Company, that the cable had a tendency to rise on the pulleys, due to the roughened condition and that it should be replaced with a new cable; and that Mr. Gedge had replied that the cable would be replaced. Nothing was said by Ward as to any danger to be apprehended from the continued use of the cable, and no danger

was in fact apprehended. Under the circumstances the complaint and promise can be considered only as made with regard to the efficiency of the conveyor and not with respect to danger. Consequently we contend that the complaint and promise, if made, do not exempt Ward from the doctrine of assumption of risk.

Another point upon which the Company relies is that the replacing of the cable was clearly within the line of Ward's employment and hence the complaint and promise with respect to the cable did not relieve Ward from the assumption of the danger and risk attendant upon that operation.

### *The Accident.*

On Monday, the 8th day of July, 1912, the cable came off the pulleys at the harbor end of the conveyor while a coal vessel was being unloaded. At the time that this happened Ward was on board the coal vessel, according to his own testimony, and first became aware of the fact that something was wrong by being called by one of the hands (Tr. p. 181). He thereupon left the coal vessel, went along the wharf, and climbed the flight of stairs to the scale house, which is approximately midway between the outer end of the conveyor and the shore end. Arriving there he inquired as to what had occurred and was informed that the cable had come off the pulleys at the beginning of the curve at the harbor end of the conveyor. Before he arrived the engine which operated the drum and propelled the cable had been stopped and the cable itself was no longer in motion (Tr. pp. 182, 286-290).

Upon arriving at the makai end of the conveyor he found that the cable had slipped off the first, or easternmost, four pulleys of the series of eight on the Ewa or North side of the turn, but that it was still in position on the other four pulleys of this series of eight, as well as being in position on all of the sixty pulleys around the curve and on the eight pulleys on the other

side of the curve (Tr. p. 183). Having observed this condition (and necessarily noting a fact well known to him at the time that, at this particular point on the track there was no guard rail or platform) (Tr. p. 215), and without lifting the weighted box or causing it to be lifted (Tr. p. 310), which would have removed the tension from the cable, Ward attempted by the use of a crowbar to pry the cable back into position (Tr. pp. 184-185). Later in the brief we shall discuss the evidence as to just where Ward stood and how he was using the crowbar. As to this point the evidence was conflicting. Some of the witnesses, including Ward, testified that Ward stood on the inside of the track with his crowbar on the outside of the cable and prying inward holding the cable (Tr. p. 185); others testified that Ward stood astraddle of the cable, facing toward the sea or westward, with his crowbar on the outer side of the cable and attempting to pry upward and inward or toward the center of the circle. While thus attempting to pry the cable back into position and when it was nearly in the place where it could be slipped down over the four pulleys from which it had escaped, something slipped, either the crowbar at its lowest point or, as seems more likely, the cable upon the crowbar, with the result that the cable slipped off the other four pulleys of this series of eight, slid up the crowbar striking Ward on the inside of his right leg (Tr. pp. 297-298). Ward was hurled off of the track and down to the wharf below, a distance of some twenty-five feet, with the result that he sustained the injuries for which he is seeking recovery.

The foregoing facts having been developed on the plaintiff's case the defendant Company moved for a non-suit on the following grounds:—

That the plaintiff failed to show that the defendant was guilty of negligence as charged or at all; that the proximate cause of the injury to the plaintiff was his own act; that the plaintiff was guilty of negligence which not only contributed to the accident,



but without which the same could not have occurred, and that the plaintiff assumed all risks of the employment which resulted in the accident (Tr. p. 310). This motion having been denied the Company put on its case and then requested that the jury be instructed to return a verdict in its favor. This request having been denied the case went to the jury who found for the plaintiff in the sum of \$13,000.00.

The plaintiff in error relies upon all of the errors assigned, which are as follows:—

(1) That the Supreme Court of the Territory of Hawaii erred in its judgment in affirming the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii for the reason that said judgment was and is contrary to the evidence and the law;

(2) That the Supreme Court of the Territory of Hawaii erred in affirming the action of the Honorable William J. Robinson, Third Judge of said Circuit Court, in denying the motion of the defendant in said action, plaintiff in error, for a judgment of non-suit for the reason that the plaintiff in said action failed to show that the defendant was guilty of negligence as charged or at all; that the proximate cause of the injury to the plaintiff was his own act; that the evidence showed the plaintiff to be guilty of negligence which not only contributed to the accident but without which the same could not have occurred, and for the reason that the evidence shows that the plaintiff assumed all risks of the employment which resulted in the accident;

(3) That the Supreme Court of the Territory of Hawaii erred in affirming the action of said Circuit Court in refusing to instruct the jury in said cause to render a verdict for the defendant, plaintiff herein, as requested by said defendant, said requested instruction being as follows:

I instruct you gentlemen of the jury that there is no evidence tending to prove that the negligence of the defendant, if any, was the proximate cause of the injuries sus-

tained by the plaintiff, and that your verdict must be for the defendant.

(4) That said Supreme Court of the Territory of Hawaii erred in affirming the action of the jury in said Circuit Court before whom said cause was tried in rendering their verdict in favor of the plaintiff and against the defendant in the sum of \$13,000, for the reason that there was no evidence tending to prove that the negligence of the defendant, if any, was the proximate cause of the injuries sustained by the plaintiff, and that said verdict should have been for the defendant;

(5) That the Supreme Court of the Territory of Hawaii erred in affirming the action of such Circuit Court in denying the motion of the plaintiff in error for a new trial, for the reason that said verdict of said jury was and is contrary to the law and the evidence and the weight of the evidence;

(6) That the Supreme Court of the Territory of Hawaii erred in affirming the action of said Circuit Court in giving, rendering, entering and filing judgment in favor of plaintiff and against the defendant in the sum of \$13,000 together with costs taxed in the sum of \$97.20 for the reason that the plaintiff in said action failed to show that the defendant was guilty of negligence as charged or at all; that the proximate cause of the injury to plaintiff was his own act; that the evidence showed the plaintiff to be guilty of negligence which not only contributed to the accident but without which the same could not have occurred, and for the reason that the evidence shows that the plaintiff assumed all risks of the employment which resulted in the accident (Tr. pp. 796-799).

Inasmuch as the same points apply to each of the assignments of error, we shall in the argument deal with these points separately rather than each assignment separately. In this manner unnecessary repetition will be avoided. The points to be discussed and the order in which they will be taken up in the argument are as follows:—

1. There is no evidence showing defendant guilty of any negligence.
  - (a) The cable was not in a dangerous condition or unfit for use.
  - (b) Assuming the roughened condition of the cable caused the cable to slip off the pulleys, at the most it merely furnished the occasion for Ward's going to replace it, and the condition of the cable was therefore not the proximate cause of the accident.
  - (b. 1.) While ordinarily the determination of the proximate cause is for the jury, yet where reasonable men can come to but one conclusion from the facts the question is one of law for the Court.
2. Ward was guilty of negligence which not only contributed to the injury, but without which the injury would not have occurred.
3. Ward assumed all risks attendant upon repairing any defective appliances which hindered or stopped the operation of the conveyor, this work being part of his regular duty.
  - (a) The promise to replace the cable being made with respect to the efficiency of the work and not with respect to the safety of the workmen, did not, as a matter of law, relieve Ward from his assumption of the risks attendant upon replacing it on the pulleys.
4. The Court did not follow nor properly apply the principles laid down by it in its first decision wherein it decided that Ward assumed whatever risks there were from the lack of a guard rail.



# 1. THERE IS NO EVIDENCE IN THE CASE SHOWING DEFENDANT GUILTY OF ANY NEGLIGENCE.

It will be borne in mind that in the complaint the Defendant Company is charged with negligence in but two particulars, i. e. in not providing a platform and guard rail at the end of the conveyor where the accident occurred, and in permitting the continued use of a cable which was unfit for use and dangerous and unsafe. The Supreme Court of Hawaii disposed of the first charge of negligence in the first decision in this case, holding that Ward had assumed whatever risks there were attendant upon working at the end of the conveyor without the protection afforded by a guard rail or platform, 22 Haw. 66, 73 (Tr. 26-27), and nothing in its second decision changed or modified this proposition. Accordingly the only allegation of negligence left for consideration is that with respect to the condition of the cable.

## (a) *The Cable Was Not in a Dangerous Condition Nor Unfit for Use.*

Neither Ward nor any of his witnesses testified that the cable was so weakened by being worn as to render it unsafe to use. In fact Ward himself, when he was given an opportunity of saying that the cable was dangerous, made it as clear as he could that he did not so consider it. Note the following question addressed to Ward and his reply.

“Q. You didn’t mean to say that that cable was dangerous then or unfit for use?”

“A. I didn’t say anything about that cable being dangerous.” (Tr. p. 250).

There was no testimony adduced on behalf of the plaintiff to the effect that because of the condition of the cable any danger of breaking was apprehended, and in fact it did not break.

Ward testified that he told Mr. Gedge, the Secretary and Treasurer of the defendant Company, on the Saturday previ-

ous to the accident, that the cable, by reason of its roughened condition, had a tendency to rise on the pulleys and that consequently a new cable should be put in (Tr. p. 178), but he did not tell Mr. Gedge that there was any danger to be apprehended from the continued use of the cable. In fact all that could be apprehended from Ward's statement was that the cable might come off and that the work of unloading the coal ship might have to be delayed during the time necessary to replace the cable in position. As the entire operation of replacing the cable after it had come off had been performed on this particular Saturday in between twenty and thirty minutes (Tr. p. 82) and without any difficulty whatsoever, *because the weight had been lifted and the tension taken off the cable*, there was no reason to believe that there would be any danger in continuing the use of the cable.

And yet it was contended by counsel for the defendant in error in the Supreme Court of Hawaii that "the best proof of the dangerous and unsafe nature of the cable was afforded in the accident itself." **That this contention is unsound is evident** from an examination of the facts of the accident, for when the cable came off on the Monday in question no one was injured thereby. Neither Ward nor any one else was struck by the cable while it was in the act of coming off the pulleys; no car was thrown off the track. Nothing, in fact, occurred except that work on the conveyor had to be suspended until the cable could be replaced in position. Taking the evidence of what actually occurred in connection with the uncontroverted evidence of Mr. Young as to the strength of the cable at the time of the accident being twelve to fifteen times the strain to which it was subjected (Tr. pp. 616-618) the conclusion is beyond question that the cable was not dangerous or unsafe.

The only proof adduced by plaintiff in respect to the condition of the cable was that it had become roughened and worn so that at intervals throughout its length some of the small wires, of which the strands of the cable were formed, stuck out from



the cable from a sixteenth of an inch to about one inch in length (Tr. pp. 63, 177).

Two of the witnesses for plaintiff testified that, on the Saturday immediately before the Monday on which the accident occurred, the cable came off the pulleys at the makai end of the conveyor and after it had been replaced on the pulleys and the engine started again, they observed the cable while it was in operation in order, as they said, to determine the cause of its coming off. They both testified that they observed the cable rise and fall on the pulleys, due, as they thought, to its roughened condition. At this time the rising of the cable on the pulleys was not sufficient to take it above the top of the pulleys. Neither one, however, observed the cable come off the pulleys (Tr. pp. 66, 84-85, 176-177).

From the fact that these two men testified that they observed the cable on this occasion and saw it had a tendency to rise and fall on the pulleys, plaintiff makes the claim and, in fact, bases the entire case against the defendant Company upon the assumption that the cable came off the pulleys on the day of the accident by reason of its roughened condition. As a matter of fact, however, this particular cable had come off the pulleys at this point two or three times in the period of about four weeks immediately preceding the date of the accident (Tr. p. 98). As no one saw the cable come off on these occasions or on the day of the accident, it cannot even be assumed that its roughened condition was the cause of its coming off on the day of the accident or on the other occasions.

In an endeavor to show that a roughened cable was not suitable for use on the conveyor Ward testified that during all of the time he had been on the conveyor he had never seen any cable come off at the makai end. This negative statement did not prove that no cable had ever come off at that point before—but it went as far as negative testimony can. Against this and absolutely unquestioned is the evidence of Mr. Gedge that the cable came off on the curves practically every time a coal ship



was being unloaded, a matter of five or six times a year—and regardless of whether the cable was new or worn (Tr. p. 399).

Moreover this particular cable was practically as rough when the first of the foreign coal ships came in as it was at the time of Ward's accident (Tr. pp. 93-95, 98-99)—and the cable continued in use six days after that—during which all the cargoes of three coal boats—averaging five thousand tons each, 15,000 tons in all, were discharged by this cable (Tr. pp. 152, 386). Certainly a cable which was unfit for use could not have done this amount of work. The only conclusion justified by the evidence is that the cable although roughened and worn was fit and suitable for the use to which it was put.

The defendant Company was not permitted by the trial court to show the reason why the old cable was replaced six days after the accident by a new cable. It cannot be assumed from this, however, that the cable was taken out because of any danger to be apprehended from its continued use. On the contrary the most natural assumption and the only one to be indulged in, in the absence of evidence to the contrary, is that the work of unloading these coal ships having been completed, all of the appliances on the conveyor, including the cable, were overhauled and put in first class condition either by repairs or replacements so that there would be no necessity for delay when the next occasion came for the use of the conveyor.

After this cable had been taken out and replaced by a new one, it was kept upon the wharf for some time and eventually given away as the defendant Company had no further need for it.

During the course of the trial counsel for Ward tried to make it appear that the giving away of the cable was clear proof of the fact that it was no longer fit for use. In a sense it is true that the cable after it was taken out was not fit for further use as a *hauling cable* on the conveyor—not however because it was too roughened for further use or because it had become too weak to carry the strain, but because it would be practically impossible to use it again. The reason is evident when it is re-

membered that the ends of the cable had to be spliced together when originally installed in order to make it endless. To take the cable off it had to be cut (Tr. p. 422). After the cable was cut the length would not be sufficient for a new splice. Under the circumstances it is plain that even a comparatively new cable would be of no further use on the conveyor, because it would be too short to permit of splicing the ends together after it had been cut in two.

In the absence of evidence as to the cause for removing the cable (a matter on which the trial court would not admit evidence, Tr. pp. 420-421) the court is not entitled to draw inferences as to the cause, adverse to the defendant, especially in view of the work it did after the accident.

In endeavoring to show the defendant company negligent in continuing the use of the cable Ward testified that the "life of a cable" was only eight months (Tr. p. 203). The fact that other cables had been in use—some only two weeks (Tr. p. 205) and others fifteen months (Tr. p. 416) shows that Ward's statement does not even amount to an opinion but can be considered only as a claim. No useful purpose will be served by attempting to have this question decided for it is not essential to a decision of the case as the point in issue is not whether, generally speaking, the life of a cable is eight or ten months—but whether this particular cable at the time of the accident was dangerous for use.

From the evidence in the case respecting the condition of the cable, we submit that the only conclusion which is warranted is that although worn and roughened it was fit and suitable for use and not dangerous, and further that the plaintiff failed to prove that it came off the pulleys, on the date of the accident, because of its roughened condition.

In considering the condition of the cable in connection with the fact that an accident occurred in which Ward was seriously injured, it should be borne in mind that the accident occurred not while the cable was in motion, but after it had come to rest and had been at rest for some time. There is nothing in the



case from which it can be assumed that the accident would not have happened had a new cable come off at this particular point. The condition of the cable, so far as the evidence showed, had no effect whatsoever upon making Ward fall to the wharf below. The roughened condition, if in fact it was the cause of the cable coming off the pulleys, ceased to operate as soon as the cable had come off the pulleys and had been brought to rest by stopping the engine. The danger that existed after the cable came off, and the cause of Ward's accident, was not the roughness of the cable, but the fact that Ward attempted to replace the cable at this dangerous place without first lifting the weight which kept the cable taut. There, and there alone, is where the danger existed. The conclusion, therefore, must be that it was the way Ward attempted to replace the cable that was dangerous and not the cable or its condition.

In the second decision in this case by the Supreme Court of Hawaii, it was assumed that the facts were not materially different from those disclosed in the first decision and therefore the Court assumed that it had decided that the contention of Ward that the Company was negligent in permitting the use of the cable had been established. In the first decision the Supreme Court of Hawaii held *on facts materially different from those brought forth in the second trial* that the cable came off the pulleys on the day of the accident by reason of its roughened condition; that the cable was in a dangerous and unsafe condition and that it was unfit for the use and purpose required of it.

We are concerned now only with the second decision in the case and that must stand or fall on the facts brought out in the second trial regardless either of the first decision or the evidence then before the court. An examination of the record before this court will show that the Supreme Court reiterated the findings made in the first decision without having evidence before them to sustain those findings.



The evidence in the record to which we have called attention does not, we submit, justify a finding that the Company was negligent in permitting the use of the cable.

- (b) *Assuming the roughened condition of the cable caused the cable to slip off the pulleys, at the most it merely furnished the occasion for Ward's going to replace it, and the condition of the cable was therefore not the proximate cause of the accident.*

As we have already stated the only claim made by plaintiff as to the cable is that it was roughened and worn and on account of this condition it came off the pulleys on the day of the accident and that the Company's permitting the use of this cable constituted negligence on its part. It is not alleged in the complaint nor was there any evidence tending to show that the roughened condition of the cable operated to do anything other than cause the cable to come off the pulleys. There is no claim or evidence to support it that Ward or any one else was injured by the cable coming off the pulleys nor even that any coal cars were derailed by reason of the cable coming off the pulleys.

The evidence is clear and undisputed that after the cable had come off the pulleys the engine and the drum which operated the cable were stopped and the cable brought to rest and that not until the cable was absolutely at rest did Ward even start to go to the place where the cable was off the pulleys (Tr. p. 183). In other words all the harm that could have been anticipated from the continued use of the roughened cable had occurred before Ward even went to the place where the cable was off.

A considerable interval of time elapsed between the coming off of the cable and Ward's arrival at that place for Ward had to walk the distance from the scale house to the end of the conveyor (Tr. p. 183), approximately three hundred feet, to get to where the cable was off.

Upon his arrival at the place where the cable was off, Ward "sized up" the situation and decided that he could pry the cable

back into position by the use of crowbars without lifting the weight and thereupon attempted to carry his plan into execution. There was no evidence to the effect that the roughened condition of the cable made it more difficult to replace than a new cable, nor can this be assumed. The danger attendant upon prying the cable back into position or doing any work at this place was obvious, for from the top of the trestle, where the cable was off, to the wharf below was twenty-five feet and the distance between the cable and the outer edge of the trestle was less than two feet. Beyond the ends of the ties there was nothing, either in the shape of a platform or a guard rail, to prevent a fall to the wharf below (Tr. p. 185). All that was necessary to bring about a fatal accident to Ward was that he should lose his balance and fall over the edge. And that is precisely what occurred, for while Ward was attempting to pry the cable back into position something slipped, either his crowbar or the cable and Ward lost his balance and fell over the edge down to the wharf below.

To entitle the plaintiff to recover from the defendant it is essential that he show that the defendant's negligence was the proximate cause of the accident and did not merely furnish the condition or give rise to the occasion which made the injury possible. The distinction in this regard is clearly indicated in the following definitions of proximate cause.

Judge Cooley defines proximate cause as follows:

"A proximate cause has been aptly defined as one which in natural sequence undisturbed by any independent cause produces the result complained of. To be proximate the cause must be one without which the accident or injury would not have occurred. It is frequently said that in order that an act or omission shall be the proximate cause of an injury, the injury must be the natural and probable consequence of the act or omission and such as an ordinarily reasonable and prudent man under the given circumstances might and ought to have seen in advance. . . . . In determining what is a proximate cause the true rule is



that the injury must be the natural and probable consequence of the negligence, such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow from his act."

1 Cooley on Torts. (3rd ed., pp. 124-125).

South Side Passenger Ry. Co. v. Trech., 117 Pa. St. 390, 11 Atl. 627.

In Cyc. the following is said with regard to proximate cause:

"In order to establish proximate cause it is necessary in the first place that there be a causal connection between the negligent act and the injury. The act must have been such that without it the injury would not have happened. It must have been the cause which produced the injury, the *causa causans*, and hence where the act did not contribute to the injury it cannot be the proximate cause. The mere fact that the negligence in point of time preceded the injury does not of itself establish the causal connection .....". (29 Cyc. 489)

"If the injurious result could have been avoided by the exercise of care the original cause is not the proximate cause." (29 Cyc. 491)

On pages 492-495 of 29 Cyc. there follows a statement of the law very similar to that above quoted from Judge Cooley.

In 29 Cyc., page 496, the following appears:

"A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible if there intervened between such prior or remote cause and the injury a distinct successive unrelated and efficient cause of the injury. If no danger existed in the condition except because of the independent cause such condition was not the proximate cause, and if an independent negligent act or defective condition sets into operation the circumstances which because of the prior defective condition result in injury, such subsequent act or condition is the proximate cause."



Applying the principles laid down in the foregoing quotations to the facts in the present case, we submit that the roughened condition of the cable "did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible" and that "there intervened between the prior or remote cause," i. e. the roughened condition of the cable, "and the injury a distinct, successive, unrelated and efficient cause of the injury," to-wit: Ward's attempting to pry the cable back into position without first lifting the weight, at a place made hazardous by the absence of a platform or guard rail which, had it been in position, would have prevented Ward from falling to the wharf below. In other words Ward's own act was the proximate cause of the accident.

It was contended by Ward in the Court below, and no doubt will also be contended here, that there was no intervening agency between the negligence of the Company and the injury to Ward because Ward's act was set in motion and made necessary by the Company's negligence. In other words the argument is that if the cable had not been rough it would not have come off and if it had not come off Ward would not have gone to replace it and the accident would not have occurred. Hence it is argued that Ward's act was not independent but was dependent, and closely connected with the Company's negligence.

This argument is unsound because the coming off of the cable resulted in no injury to Ward. The true test in determining whether the Company's negligence was the proximate cause is to ascertain whether that negligence alone and unassisted by any other act or agency accomplished the injury.

The fact that only five or ten minutes elapsed between the coming off of the cable and Ward's injury does not of itself prevent Ward's act from being independent, distinct and unrelated to the condition of the cable. Had the cable come off on Saturday afternoon at quitting time and Ward had then decided to wait until Monday morning before replacing it and then on Monday Ward had done what he actually did, it would be perfectly clear that Ward's act on Monday was entirely independ-

ent. Whether Ward replaced the cable as soon as it came off or waited a day or a week or a month before doing so, the coming off of the cable would have been the cause of Ward's going to replace it and if counsel's argument is sound no matter what length of time intervened the roughened condition of the cable would have been the proximate cause of the accident.

If counsel's contention is correct the Company would be liable for Ward's injuries had he stumbled and fallen to the wharf below while on his way to the place the cable was off. It is evident that the contention carried to its logical conclusion is preposterous.

The real question that is presented is this: Did the defective condition of the cable alone cause Ward's injury or was there something independent of this which operated to cause it? The only answer justified by the evidence is that the defective condition of the cable did not cause any injury to Ward. The injury was caused by his independent act in attempting to replace the cable without lifting the weight *coupled with the fact that there was no guard rail at this place to prevent him from falling to the wharf below in case he slipped or lost his balance.*

The evidence of Ward himself shows that the roughened condition of the cable had no effect whatever in making it harder or easier to replace in position. The evidence of Prof. Young on this point (it is all there is) is that a new cable is more difficult to handle than an old one (Tr. p. 764), and he gives substantial reasons for his opinion and the uncontradicted testimony in the case shows that cables in good condition had frequently come off the pulleys at the makai end of the conveyor and had to be replaced (Tr. pp. 551-552).

The coming off of the cable at this point two or three times during the month before the accident (Tr. p. 98) was not shown to have been caused by the condition of the cable. Consequently we submit that the evidence justifies the conclusion that a new cable was just as likely to come off the pulleys as a roughened



one. Therefore under the rule laid down in *Baltimore R. R. Co. vs. Reaney*, 42 Md. 136, the defendant would be exempt from liability.

In the Court below counsel for Ward contended that there was no distinct, unrelated, successive and efficient cause which intervened between the negligence of the Defendant and Ward's injury. No doubt the same contention will be made here. This is practically the same proposition as that set out above put in different language. It cannot be denied that Ward attempted to pry the cable back into position and it was that act of Ward's at a dangerous place which resulted in the fall and injuries to Ward. We contend that this act of Ward's was independent, distinct, unrelated, successive and efficient. Whether it was distinct, unrelated and independent depends upon whether the condition of the cable had any effect in producing the accident. Plaintiff did not contend in the trial that the condition of the cable had any effect whatsoever upon the actual operation of replacing the cable in position nor was that argument made before the Supreme Court of Hawaii. Under these conditions Ward's act was independent of the condition of the cable and distinct from it. It was also unrelated to the condition of the cable for Ward would have had the same situation to deal with had a new cable instead of the one in question come off the pulleys at this point. That Ward's act was efficient in causing the accident is beyond question.

No matter how this question is approached the logical conclusion must be the same, viz. that the condition of the cable at the most furnished the occasion for Ward's going to replace it, but that Ward's act was independent, distinct, unrelated, successive and efficient and the cause of his accident.

The following cases are illustrative of this proposition:

*Missouri Pac. R. Co. vs. Columbia* 65 Kan. 390; 58 L. R. A. 399.

*Carter vs. Lockey Piano Co.*, 177 Mass. 91; 58 N. E. 476.

*Cattle Co. vs. Atchison T. & S. F. Ry. Co.* 135 Fed. 135, 140.



- The Santa Rita 173 Fed. 413.  
 Stone vs. Boston & A. R. Co. 171 Mass. 536, 41 L. R.  
 A. 794, 797.  
 Teis vs. Smuggler Mining Co. 158 Fed. 260.  
 Scheffer vs. Railroad Co. 105 U. S. 249.  
 Am. Bridge Co. vs. Seeds 144 Fed. 605.  
 Conley vs. Express Co. 87 Me. 352.  
 Jackson vs. Gulf Elevator Co. 209 Mo. 506, 108 S. W.  
 44.  
 Jenks vs. Wilbraham 11 Gray (Mass.) 142.  
 Lutein vs. Hurley 98 Mass. 211.  
 Jennings vs. Davis 187 Fed. 703, 713.  
 Lamotte vs. Boyce 105 Mich. 545.  
 McGough vs. Bates 21 R. I. 213.  
 Pryor vs. L. & N. R. Co. 90 Ala. 32, 8 S. 55.  
 C. N. O. & T. P. Ry. Co. vs. Mealer 50 Fed. 725.  
 Foley vs. McMahon (Mo.) 90 S. W. 113.  
 Luxen vs. Chicago & G. T. R. Co. 69 Ill. 648.  
 Trapp vs. McClellan 74 N. Y. Supp. 130.

See also 29 Cyc. 488-502.

In view of the foregoing we submit that the defective condition of the cable was not the proximate cause of the accident.

I. (b-1) *While ordinarily the determination of the proximate cause is for the jury, yet where reasonable men can come to but one conclusion from the facts the question is one of law for the court.*

The first decision in this case reported in 22 Haw. 66 (Tr. pp. 16-33) does not go so far as to hold that the question of proximate cause is never to be determined by the court. There is nothing in the decision from which it can be inferred that the court intended to go so far, nor does the case of Milwaukee & St. P. R. Co. vs. Kellogg, 94 U. S. 469, which was evidently the basis of this decision, lay down any such rule. In the latter case the Supreme Court of the United States, after stating the general rule to be that ordinarily the determination of proximate cause is a question for the jury, went on to analyze the evidence in that case and sustained as good law the very propositions which the jury had decided. The question which had

to be determined there was whether the negligence of defendant in setting fire to one building was the proximate cause of the burning of an adjoining building, there being no intermediate efficient and independent cause operating between the original negligence and the final injury. In the view which the Supreme Court took of the facts before them in that case, there was no occasion for defining the cases in which the question of proximate cause would be a matter for determination by the court.

But the very fact that the Supreme Court recognized that there must be an unbroken connection between the wrongful act and the injury, and that if there were an independent intermediate efficient cause operating between the original wrong and the injury, the injured person must look to the person responsible for the intermediate cause for his damages rather than to the original wrongdoer, makes it evident that, had the Supreme Court considered that the evidence in the case before them justified or demanded the finding that there was such an intermediate cause, they would have reversed the case and sent it back for a new trial. In other words, they would have considered the question then one for the court and not for the jury. In the case of *Scheffer vs. Railroad Company*, 105 U. S. 249, 26 Law. Ed. 1070, the facts were these: A collision occurred between two railroad trains and a person was so injured thereby that he subsequently became deranged and committed suicide. The Supreme Court of the United States held, as a matter of law, that the proximate cause of this man's death was his own act, and that the Railroad Company was not liable therefor.

On the proposition that where the facts are not in dispute the question of proximate cause is properly treated as one of law for the court, we respectfully refer this Court to the following cases:

*Teis vs. Smuggler Mining Co.* 158 Fed. 260, 269.

*Clark vs. Wallace*, 51 Colo. 437, 27 A. & E. Ann. Cases 349, and Case Note P. 353.

*Moulton vs. Gage*, 138 Mass. 390.



O'Maley vs. Boston Gas Light Co., 158 Mass. 135, 47 L. R. A. 161.

Franch vs. Columbia Spinning Co., 169 Mass. 531.

Hamelin vs. Malster, 57 Md. 287.

Scheffer vs. Railroad Co., 105 U. S. 249.

McKenna Steel Working Co. vs. Lewis, 111 Fed. 320.

Tuttle vs. Detroit etc. Ry., 122 U. S. 189.

Am. Bridge Co. vs. Seeds, 144 Fed. 605.

Conley vs. Express Co., 87 Me. 352.

Jackson vs. Gulf Elevator Co., 209 Mo. 506, 108 S. W.

44.

Jenks vs. Wilbraham, 11 Gray 142. (Mass.)

Coal Co. vs. S. S. Co., 142 Fed. 402, 409.

Lutein vs. Hurley, 98 Mass. 211.

Jennings vs. Davis, 187 Fed. 703, 713.

Lamotte vs. Boyce, 105 Mich. 545.

McGough vs. Bates, 21 R. I. 213.

Pryor vs. Louisville & N. R. Co., 90 Ala. 32, 8 S. 55.

C. N. O. & T. P. Ry. Co. vs. Mealer, 50 Fed. 725.

Foley vs. McMahon (Mo.), 90 S. W. 113.

Trapp vs. McClellan, 74 N. Y. Supp. 130.

See also 29 Cyc. 488-502.

Since, therefore, it appears that the only act of plaintiff which can be claimed to have been negligent was in permitting the use of a *roughened* cable, not shown to be either dangerous or unsafe, and which in fact did no injury but merely slipped out of position, and since this slipping furnished nothing but an occasion for the doing of certain work during the performance of which the injury occurred, we submit that on this branch of the case the defendant was entitled as a matter of law to a nonsuit, to its requested instruction for a verdict in its favor and to a verdict from the jury, and that consequently the judgment should now be reversed.

The case upon which plaintiff mainly relies to sustain the judgment of the Supreme Court of Hawaii and which that Court practically followed in its first decision, is Chicago R. I. & P. R. Co. vs. Moore (Okla.), 43 L. R. A. (N. S.) 701. Judge Perry in his dissenting opinion in the first decision in



this case clearly distinguished the Moore case (see Tr. pp. 27 to 33).

A comparison of the facts in the two cases in parallel columns will be of assistance in showing their dissimilarity:

In the Moore case the breakdown could not have occurred if proper inspection and repair had been made.

In the Ward case the coming off of the cable was of frequent occurrence and could not have been prevented by putting a new cable in place of the one in use.

In the Moore case the negligence of the Company enhanced the risk of injury for two reasons: 1. Because the exact nature of the break could not be seen by the Plaintiff; and 2. Because the Plaintiff's duties did not require him to make any repairs except emergency repairs the occasion for which could not have been prevented by proper inspection.

In the Ward case the negligence of Defendant, if any, did not enhance the risk of injury for two reasons: 1. Ward could see exactly what had occurred, nothing was hidden nor obscure and the danger of falling to the wharf was evident and Ward knew that he must guard himself from that; and 2. Ward's duties required not merely the making of emergency repairs and replacements but attending to any part of the conveyor whenever it got out of order.

In the Moore case the Defendant was charged with knowledge of the fact of the defect and must have known that some sort of injury was liable to result.

In the Ward case the Defendant was not charged with knowledge of the defect even if told by Ward because Ward was foreman in charge of the conveyor, knew of the spare cable and had authority and discretion, without consulting Gedge, to see that a new cable was put in if he deemed it advisable (Tr. 338). The

Defendant had no reason to foresee that Ward would recklessly attempt to restore the cable without first lifting the weight.

Moreover the only injury which could result from the condition of the cable was delaying the work of discharging coal during the time necessary to replace the cable, twenty or thirty minutes, an injury not to Plaintiff but to Defendant.

We submit that from the foregoing comparison it will be seen that the facts in the Moore case differ essentially from those in the case at bar. There is however dictum in the Moore case and good law and which applied to the facts in the case at bar prevents recovery by the Plaintiff.

In the Moore case the Court said, "Neither could an employee regularly engaged in repairing machinery of the Company recover for an injury received . . . . however negligently the necessity for repairs might have been caused if it was his regular business to repair and the danger in his employment was exactly the same whether the repairs were made necessary by negligence or accident." 43 L. R. A. (N. S.) 706.

In the present case the Plaintiff was employed as foreman of the conveyor and it was part of his regular duty to make repairs and replacements whenever anything got out of order. The duties and dangers of his employment were the same whether the cable came off because of negligence or accidentally. (Tr. pp. 117-118, 127-128, 191, 217, 381, 391, 400, 511-512, 548, 563.)

## II. WARD HIMSELF WAS GUILTY OF NEGLIGENCE WHICH NOT ONLY CONTRIBUTED TO THE INJURY BUT WITHOUT WHICH THE INJURY WOULD NOT HAVE OCCURRED.

Probably no man in the employ of the defendant corporation knew more as to the actual construction and operation of the coal conveyor and all its appliances than plaintiff himself, for he erected all of the steel work of the conveyor, and all of the appliances connected with it (Tr. pp. 214-215): he was foreman of the conveyor from the time that the conveyor was erected up to the time that he was hurt, and had charge of its operation whenever foreign coal ships were in port discharging their cargoes (Tr. p. 216). He was foreman of the conveyor and bossing the men when the first cable was installed (Tr. p. 215), and before each coal boat came in Ward went down to the conveyor and looked things over to see that everything was in good working order (Tr. p. 127-128). He knew that by raising the weight the tension on the cable was removed and that slack could easily be obtained thereby sufficient and without the need of a crow bar or other tool to put the cable back in position after it had come off the pulleys (Tr. pp. 189). He also knew that the tension or spring on the cable at the point by the eight pulleys was outward and away from the track, in the direction in which he fell because he had to pry in the opposite direction (Tr. pp. 185, 291-292). Akina, one of plaintiff's own witnesses, and a man who had worked on the conveyor for a shorter period than had Ward, testified that the first thing to do when the cable was off was to lift the weight and get the slack (Tr. 138). Ward's familiarity with the conveyor and its mechanical appliances should be borne in mind in considering whether he was negligent in choosing the method by which he attempted to replace the cable on the pulleys.

The effect on the cable of lifting this weight was to remove the tension to such an extent that in the straight parts of the tracks, the cable, instead of merely touching the horizontal dol-



lies, would sag between these dollies and touch the ties. By thus lifting the weight it was found that there was sufficient slack at the makai end of the conveyor so that one man (George Dennison), using only his hands, was able to lift the cable from its position on the eight pulleys at the beginning of the curve and throw the cable entirely out of position. Mr. Dennison stated that the slack appeared at this point (the makai end of the conveyor) within two minutes from the time the weight was lifted (Tr. p. 662). Not only was this witness able to put the cable in this position after the weight had been raised and the tension on the cable removed but was able by the use of his hands alone to put the cable back in its proper position again (Tr. pp. 661-663).

According to the contention of plaintiff the only way in which sufficient slack could be obtained so as to perform the operation testified to by Mr. Dennison, was to lift the weight, then go upon the railway track by the scale house, haul on the cable until the slack had been obtained, then proceed along the track for a hundred feet or so and again haul this slack forward and continue in this way from the scale house clear around to the coal dumping yard and the curved end of the track at that point and then back around to the track on the Ewa side of the coal conveyor to the point where Mr. Dennison performed his experiment, and that this operation would take at least two hours, and yet he admitted (Tr. p. 184) that the reason he did not lift the weight was that there was sufficient slack to replace the cable without first lifting the weight. However Akina on the Saturday before the accident when the cable was off lifted the weight, and obtained slack sufficient to put the cable back by hand (Tr. pp. 70-71) without doing any hauling on the cable and the entire time required in putting the cable back in position was twenty or thirty minutes (Tr. p. 82). Whether Ward was right or not as to the necessity of hauling the cable clear around the track to get the slack the fact remains that he knew of a safe, although possibly slow, method of obtaining slack *and releasing all tension from the cable*—and yet did not adopt that method,

choosing in its place the method which was obviously dangerous and which proved disastrous.

Akina, one of the plaintiff's witnesses, said that the first thing to do when the cable came off was to lift the weight and get the slack, and if sufficient slack was not obtained in this way then to pull the cable around until it had been obtained at the place where needed (Tr. p. 138).

Akina and Merseberg testified that on the Saturday immediately before the accident the weight had been lifted, and upon doing this sufficient slack was obtained to permit of putting the cable back in position by hand (Tr. pp. 67-68, 71, 138), and Merseberg testified that the total time elapsing between the time that the cable came off until it was replaced and running again was not more than twenty or thirty minutes (Tr. p. 82).

Ward knowing what could be accomplished by raising the weight, went to the place where the cable was off, sized up the situation and evidently decided to attempt to pry the cable back without releasing the weight; he says as mentioned above that there was sufficient slack to permit of replacing the cable in position without lifting the weight (Tr. p. 184). That he was wrong in this conclusion is self-evident.

Ward knew that the place where he was working was dangerous. He could see that a fall from that place to the wharf below meant very serious bodily injury if not death, and he knew there was no guard rail or other protection to prevent this in case he slipped or lost his balance. Knowing these things he attempted to replace the cable in a way that not only placed him in danger of his life, but also the men working with him. Under these circumstances we submit no other conclusion can be reached than that Ward was grossly negligent in attempting to replace the cable on the pulleys at that place without first releasing the tension on the cable by lifting the weight. It is also beyond question from these facts, we submit, that it was Ward's negligent action in this regard which not merely contributed to the accident, but without which the accident could not have occurred.



Hamelin vs. Malster, 57 Md. 287.  
 Kansas, etc., Co. vs. Reid, 85 Fed. 914.  
 Gleason vs. Detroit, etc., Ry. Co., 73 Fed. 647.  
 Morris vs. Duluth, etc., Ry. Co., 108 Fed. 747.  
 Labatt Employer's Liability, Sec. 298.  
 Brennan vs. Front St. Cable Ry. Co., 8 Wash. 363.  
 Watts vs. Boston Towboat Co., 161 Mass. 378.  
 Ringer vs. St. Louis & S. F. R. Co., 116 Pac. 212.  
 Russel vs. Tillotson, 140 Mass. 201.  
 Leard vs. Paper Co., 100 Me. 59.  
 Williams vs. Kansas City Ry. Co. (Mo.), 52 L. R. A.  
 (N. S.) 443, 452.

There is a clear distinction between the doctrine of assumption of risk and that of contributory negligence. Warning the master of defects and receiving a promise to repair is not involved in the doctrine of contributory negligence. The warning of the master by the servant and the master's promise to repair does not relieve the servant of the duty of exercising care, and such care should be proportionate to the danger.

Reeser vs. Southern Planing Mill, Etc., Co., 114 Ky. 1.  
 Halloran vs. Iron, etc., Co., 133 Mo. 470.

While it is true that contributory negligence is frequently a question for the jury yet this is not always so, and when it clearly appears that only one conclusion can follow from the evidence the court should consider the question one of law and treat it accordingly.

Nehring vs. Connecticut Co., 89 Conn. 109; 45 L. R. A.  
 (N. S.) 896.

Watts vs. Boston Towboat Co., 161 Mass. 378.  
 Brennan vs. Front St. Cable Ry. Co., 8 Wash. 363.  
 Ringer vs. St. Louis S. F. R. Co., 116 Pac. 212; 34  
 L. R. A. (N. S.) 1044.  
 Pryor vs. Louisville & N. R. Co. (Ala.), 8 So. 55.  
 Gleason vs. Detroit, etc., Ry. Co., 73 Fed. 647.  
 Slaughter vs. City of Huntington (W. Va.), 16 L. R.



A. (N. S.) 459.

McKenna Steel Working Co., vs. Lewis, 111 Fed. 320.

Tuttle vs. Milwaukee Ry., 122 U. S. 189.

Labatt, Employer's Liability, Sec. 391.

Erskine vs. Chino Val., etc., Co., 71 Fed. 270.

29 Cyc. 630.

### III. WARD ASSUMED ALL RISKS ATTENDANT UPON REPAIRING ANY DEFECTIVE APPLIANCES WHICH HINDERED OR STOPPED THE OPERATION OF THE CONVEYOR, THAT WORK BEING PART OF HIS REGULAR DUTY.

The record shows that Ward was foreman of the conveyor and in charge of its operation whenever coal ships were being discharged and that if anything got out of order it was his duty to place it in proper working order (Tr. pp. 117-118, 127-128, 191, 217, 381, 391, 400, 511-512, 548, 563). On the day of the accident, when the cable came off the pulleys, it was Ward's duty to replace it in position in order that the work of unloading the coal ship could proceed. Ward contends that because the roughened condition of the cable made it come off the pulleys and he, therefore, was in duty bound to replace it—he can hold the defendant liable for the injuries sustained while attempting to so replace the cable because of defendant's negligence in not putting in a new cable. In other words, Ward seeks to hold defendant liable because of the defective appliance which he was attempting to repair, work which came within the regular scope of his employment.

We submit that Ward's contention is not sound, because the rule which casts upon the master a liability for failing to provide reasonably safe instrumentalities for the use of his servants is suspended when the servant is engaged in the work of repairing the defective appliance complained of. In other words, a servant put to work to repair a defective appliance cannot be heard to complain of its being defective, inasmuch as that very

thing is the cause of his being there and he undertakes to set it right, being paid for the risks he runs and voluntarily incurring them.

Labatt, Sec. 1176 and cases cited, on pages 3135 to 3140 inclusive.

Armour vs. Hahn, 111 U. S. 313, 28 L. ed. 440.

Colorado Coal & I. Co. vs. Lamb, 6 Colo. App. 255, 40 P. 251, 255.

Marshall vs. St. Louis, I. M. & So. Ry. Co., 78 Ark. 213, 8 A. & E. Ann. Cases 420, and note.

III. (a) *The promise to replace the cable being made with respect to the efficiency of the work and not with respect to the safety of the workmen did not relieve Ward, as a matter of law, from his assumption of the risks connected with replacing it on the pulleys.*

Ward's statement to Gedge on the Saturday before the accident that the cable, because of its roughened condition, had a tendency to rise on the pulleys and Gedge's promise to put in a new cable (assuming this statement and promise to have been made) were made with respect to the efficiency of the conveyor. Ward testified as follows:

"When Mr. Gedge came down he came aboard the ship and I told him that that cable came off and the cause of it coming off and I told him they would have to have a new cable and he said all right we will put a new cable in." (Tr. p. 178.)

Ward did not tell Gedge that any danger was to be apprehended from the condition of the cable nor can it be inferred from what Ward said to Mr. Gedge that any danger was to be apprehended from the continued use of the cable other than that by its coming off again, the work of unloading would be delayed. Consequently Mr. Gedge's promise must be considered as being made with respect to efficiency and not danger.

Consequently we submit that this promise did not relieve Ward from the assumption of the risks attendant upon the work of replacing the cable.



Dunphey vs. Farr & Bailey Mfg. Co., 83 N. J. L. 763; 85 Atl. 203; 45 L. R. A. (N. S.) 363 and cases cited in note.

#### IV. THE COURT DID NOT FOLLOW NOR PROPERLY APPLY THE PRINCIPLES LAID DOWN BY IT IN ITS FIRST DECISION, WHEREIN IT HELD THAT WARD ASSUMED WHATEVER RISKS THERE WERE BECAUSE OF THE LACK OF A GUARD RAIL.

It is clear from Ward's testimony that had there been a guard rail or platform at the makai end of the conveyor that he would have been prevented from falling to the wharf below and being injured as he was. Ward in describing what happened to him after the cable slipped said: "I was hurled to the wharf and was looking for something to get hold of—I was looking for something to protect myself to get hold of—there was no platform or rail at that particular point on that occasion" (Tr. p. 185).

Ward knew that there never had been a guard rail at this place (Tr. p. 215)—for he was in charge of the erection of all of the steel work of the conveyor including the installation of the rails and pulleys at this place as well as elsewhere on the conveyor (Tr. p. 150) and besides this he had been foreman of the coal conveyor whenever there were foreign coal ships being discharged for about five years before his injury (Tr. pp. 216, 116). He had been at this particular place on the Saturday before he was injured and had stayed there long enough to make up his mind as to the cause of the cable coming off the pulleys on that day (Tr. p. 176). The Supreme Court of Hawaii held that the risks attendant upon the lack of a guard rail or platform were assumed by Ward so that this question is not open to argument (See Tr. pp. 26-27).

Assuming, for the purposes of the argument, that the roughened condition of the cable gave it a tendency to rise on the



pulleys and that this was the cause of its coming off on the day Ward was injured, there were three elements which, when combined, resulted in Ward's injury:

First; the cable came off the pulleys because of its roughened condition and made the occasion for Ward's going to replace it; Second; Ward attempted to pry the cable back into position without lifting the weight, and thereby releasing the tension on the cable; and Third; because there was no guard rail or platform to prevent it, Ward upon slipping or losing his balance fell from the track to the wharf twenty-five feet below and was thereby injured.

The first element furnished merely the occasion for the accident. It was not the cause, as we have already shown. As to the second factor: If Ward had lifted the weight there would have been no tension on the cable—and hence no difficulty in replacing it on the pulleys by hand as was done on the Saturday by Akina, and again there would have been no accident. Therefore Ward himself chose a course of action which directly brought about his injury—and this act of Ward's was, if not the sole cause, certainly one of the concurring causes. And in the third place if there had been a guard rail or platform Ward would have been prevented from falling to the wharf and probably from being injured at all. But though possibly this may be considered as a concurring cause, yet this risk was assumed by Ward.

The conclusion then is that of the two causes producing the injury, one was Ward's own act, whether negligent or not, and the other was a risk assumed by him even if the defendant was negligent in that regard.

In other words if we assume, as we are bound to do, from the evidence, that the accident would have been prevented by a guard rail, then in view of the ruling that plaintiff had assumed the risk from the lack of the guard rail it follows that the plaintiff solely is responsible for his injury. In order to hold the defendant responsible for plaintiff's injury, we must ignore the fact that plaintiff assumed the risk of the lack of the

guard rail—in other words we must hold that plaintiff did not assume the risk.

As the facts in the second trial upon this question of assumption of risk warrant the same holding as was made in the first decision it follows that the second decision—holding plaintiff entitled to a recovery—is inconsistent with the court's rulings in both decisions, and consequently the judgment should be reversed.

*The Decision of the Supreme Court of Hawaii.*

Without in any way intending any disrespect to the Supreme Court of Hawaii we feel that in several particulars the decision contains statements as to the facts of the case which are not justified by the evidence. In addition therefore to what has already been said we desire to call particular attention to these statements in order that this Court may be advised thereon.

Near the beginning of the decision (Tr. pp. 770-771) the Supreme Court says:

“But it is the duty of the master to furnish suitable and safe appliances for his servants to conduct his business with, and this duty is not fulfilled by simply furnishing appliances that may be used, but which *owing to their defective condition, are liable to be misplaced and thereby necessarily subjecting the servants to extraordinary risks by replacing them.*”

As we view them the portions in italics assume, if they do not state, propositions not supported by the evidence in the case. The words “appliances . . which owing to their defective condition, are liable to be misplaced” assume, as a fact in the case, that only a defective cable was liable to become displaced, while a new cable or one in good condition was not liable to become displaced. This assumption is directly opposed to uncontroverted evidence that regardless of whether the cable was old or new it came out of position on the pulleys practically every time a coal vessel was being discharged (Tr. p. 399).



The remaining words in italic “thereby necessarily subjecting the servants to *extraordinary risks* by replacing them” imply that the coming off of the cable was extremely infrequent whereas the evidence shows, as we have just stated, that this was a matter of usual and frequent occurrence. These words also assume that the replacing of the cable, when it had become misplaced, was fraught with great and unusual danger and peril. The evidence of the ease and safety with which the cable was replaced on the Saturday before the accident *when the weight was lifted* shows that this assumption of fact was erroneous (See Tr. p. 81). So also does the evidence of George Dennison (Tr. p. 663) who alone and without tools, using merely his hands lifted the cable out of position as it was when Ward was injured and put it back into its proper position, finding no difficulty because the weight which kept the cable taut had been lifted.

Another similarly erroneous statement as to Ward “incurring an extraordinary hazard which would not have existed if a suitable cable had been installed” is found in the decision (Tr. p. 771).

On pages 771-772 the Court says “the jury were also justified in finding that a man of ordinary care and prudence, under the circumstances, would naturally apprehend that the cable would come off the pulleys, and the foreman Akina being absent, under such circumstances plaintiff would go and attempt to replace it; that being on an elevated trestle, 25 feet above the ground, injury to plaintiff would probably result.” At page 784 practically the same statement is again made.

A man of ordinary care and prudence would apprehend that *possibly* the cable would come off and Ward having been employed to keep the conveyor running, he would apprehend that Ward would replace the cable *using the safety appliances—installed and ready for that very purpose—to-wit: lifting the weight by means of the block and tackle.* He would not apprehend that Ward would attempt to replace the cable without lift-



ing the weight—especially in view of the fact that the place was unguarded by a rail or platform—a fact well known to Ward.

It is evident therefore that the opinion of the Supreme Court is based on an erroneous impression as to the facts. Confirmation of this is found in the Court's quotations from cases in other jurisdictions. For instance on page 774 the Court quotes from *Peoria Ry. Co. vs. Puckett*, 42 Ill. App. 642, as follows:

“If a brakeman be required to do such work and while attempting to perform it with care and prudence commensurate with the increased danger of such duty he is injured, not by some *peril attendant upon the manner of doing the work*, but by a danger arising from a failure of the railroad company to use reasonable care to discharge a duty incumbent by law upon it, no reason is perceived why a recovery may not be had for such injury.”

The words in italics describe accurately the cause of Ward's injury, i. e.: perils attendant upon his manner of doing the work. The inference from this citation is that Ward's manner of doing the work did not create the danger—an inference diametrically opposed to the facts, as we have shown. The remaining portions of the decision cover points which have already been fully discussed in this brief and require no further comment.

In conclusion we respectfully submit that the judgment of the Supreme Court of the Territory of Hawaii should be reversed and judgment ordered for the plaintiff in error.

Respectfully submitted,

*Attorneys for Plaintiff in Error.*



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

THE SAN FRANCISCO BREWERIES, LIMITED,  
a Corporation,  
Plaintiff in Error,  
vs.

SYLVIA A. BRAINARD,  
Defendant in Error.

---

Transcript of Record.

---

Upon Writ of Error to the United States District Court  
of the Northern District of California,  
Second Division.

---

Filed

JUL 19 1915

F. D. Monckton,  
Clerk.





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

THE SAN FRANCISCO BREWERIES, LIMITED,  
a Corporation,  
Plaintiff in Error,  
vs.

SYLVIA A. BRAINARD,  
Defendant in Error.

---

**Transcript of Record.**

---

Upon Writ of Error to the United States District Court  
of the Northern District of California,  
Second Division.

---





# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

---

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Answer .....	25
Assignment of Errors.....	129
Bill of Exceptions, Defendant's Engrossed....	33
Bond on Removal.....	19
Bond on Writ of Error.....	132
Certificate of Clerk U. S. District Court to Judgment-roll... ..	32
Certificate of Clerk U. S. District Court to Transcript of Record.....	134
Certificate of County Clerk to Transcript of Record on Removal.....	23
Citation on Writ of Error (Original).....	138
Complaint.....	1
Defendant's Engrossed Bill of Exceptions.....	33
Exceptions, Defendant's Engrossed Bill of.....	33
Exception No. 4.....	125
Exceptions to Instructions Refused and Given.	123
Instructions to the Jury.....	113
Judgment on Verdict.....	30
Notice of Petition for Removal.....	7
Order Allowing Writ of Error, etc.....	132
Order Approving, Settling and Allowing Bill of Exceptions.....	126

Index.	Page
Order for Removal of Cause.....	21
Order Shortening Time.....	8
Petition for Removal of Cause.....	16
Petition for Writ of Error.....	127
Stipulation as to Bill of Exceptions.....	126
Summons.....	4
<b>TESTIMONY ON BEHALF OF PLAINTIFF:</b>	
BRAINARD, SYLVIA A. ....	47
CUNNINGHAM, ARTHUR L. ....	50
Cross-examination.....	57
Redirect Examination .....	57
EDDINS, P. H., Jr.,.....	59
HODGKINS, St. CLAIR (In Rebuttal)...	107
Cross-examination .....	109
HOLLISTER, MIRIAM.....	46
THUN, CHARLES.....	33
Cross-examination.....	40
Redirect Examination.....	46
Recalled in Rebuttal.....	109
<b>TESTIMONY ON BEHALF OF DEFEND- ANT:</b>	
COOPER, H. M.....	78
Cross-examination.....	81
Redirect Examination .....	90
Recross-examination.. ..	90
Recalled in Surrebuttal.....	110
Cross-examination .....	110
CROW, HARRY.....	91
Cross-examination .....	95

Index.

Page

TESTIMONY ON BEHALF OF DEFEND-  
ANT (Continued).

ENCH, FRANK B.....	62
Cross-examination .....	63
McKINNON, ALEXANDER.....	70
Cross-examination .....	73
Recalled in Surrebuttal.....	111
Cross-examination .....	112
WALKER, THOMAS .....	64
Cross-examination .....	67
Verdict .....	29
Writ of Error (Original).....	135





[Complaint.]

*In the Superior Court of the State of California, in  
and for the City and County of San Francisco.*

SYLVIA A. BRAINARD,

Plaintiff,

vs.

THE SAN FRANCISCO BREWERIES, LIM-  
ITED, a Corporation,

Defendant.

The plaintiff for cause of action against the defendant above named alleges as follows:

I.

The defendant is a corporation.

II.

On the 29th day of May, 1914, in the City of Oakland, County of Alameda, State of California, the defendant had under its control and management and was using in and about the regular course of its business a certain delivery wagon and a team of two horses by which said delivery wagon was drawn. On said 29th day of May, 1914, the defendant had in its employ a certain unskillful, incompetent, and careless servant named Harry Crow, who was employed by the defendant as a driver, and who on said 29th day of May, 1914, in and about the business of the defendant, and within the scope of his said employment, was engaged in driving said horses.

III.

On said 29th day of May, 1914, while said horses and said delivery wagon were under the control and management of the defendant, said Harry Crow so

unskillfully, carelessly and negligently conducted himself in and about the driving and management of said horses, which were then and there harnessed to said delivery wagon, that said horses by reason of the unskillfulness, carelessness, and negligence of said Harry Crow took fright, [1\*] escaped from his control, and ran away, drawing after them said delivery wagon.

#### IV.

The plaintiff immediately after said horses escaped from the control of said Harry Crow as aforesaid was lawfully and in the exercise of due care on the sidewalk at the northwesterly corner of the intersection of Twentieth Street and Broadway in said City of Oakland. By reason of said negligence of the defendant the plaintiff while on said sidewalk and without any fault on her part was violently struck by said runaway horses, and was thrown down, kicked and trampled on by them, and thereby she sustained a compound comminuted fracture of her left thigh, the knee joint of her left leg was crushed, her right leg was cut and bruised, and she sustained various other injuries, and was made sick, sore, bruised and lame. The plaintiff, by reason of said negligence of the defendant and by reason of being struck, thrown down, kicked and trampled on, as aforesaid, has been ever since said 29th day of May, 1914, and still is, sick, sore, bruised and lame, and is and will be permanently lame. By reason of said injuries sustained by the plaintiff her left knee is and will be permanently stiff, and her left leg is

---

\*Page-number appearing at foot of page of original certified Transcript of Record.



and will be permanently shorter than her right leg.

By reason of said negligence of the defendant the plaintiff has been damaged in the sum of twenty-five thousand dollars (\$25,000).

WHEREFORE, the plaintiff prays judgment against the defendant for the sum of twenty-five thousand dollars (\$25,000), and for costs of this action.

HARRISON & HARRISON,  
BYRON F. STONE,

Attorneys for Plaintiff. [2]

State of California,  
City and County of San Francisco.

Byron F. Stone, Jr., having been first duly sworn says on oath: I am one of the attorneys for the plaintiff named in the foregoing complaint. I have my office in the City and County of San Francisco, State of California. The said plaintiff is absent from the said city and county. I have read the foregoing complaint, and know the contents thereof. The same is true of my own knowledge except as to the matters therein stated on information and belief, and as to those matters I believe it to be true.

BYRON F. STONE.

Subscribed and sworn to before me this 29th day of August, 1914.

[Seal]

FLORA HALL,

Notary Public in and for the City and County of  
San Francisco, State of California.

Assigned to Department No. 5, Aug. 31, 1914.

GEO. A. STURTEVANT,

Presiding Judge.

[Endorsed]: Filed Aug. 29, 1914. H. I. Mulcrevy, Clerk. By H. I. Porter, Deputy Clerk. [3]

---

*In the Superior Court of the State of California, in  
and for the City and County of San Francisco.*

SYLVIA A. BRAINARD,

Plaintiff,

vs.

THE SAN FRANCISCO BREWERIES, LIM-  
ITED, a Corporation,

Defendant.

**Summons.**

Action brought in the Superior Court of the State of California in and for the City and County of San Francisco, and the complaint filed in the office of the County Clerk of said City and County.

BYRON F. STONE, Jr., and  
RICHARD C. HARRISON,  
Attorneys for Plaintiff.

The People of the State of California Send Greeting to The San Francisco Breweries, Limited, a Corporation, Defendant.

YOU ARE HEREBY DIRECTED to appear and answer the complaint in an action entitled as above, brought against you in the Superior Court of the State of California, in and for the City and County of San Francisco, within ten days after the service on you on this summons—if served within this City and County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract or will apply to the Court for the relief demanded in the complaint.

GIVEN under my hand and seal of the Superior Court at the City and County of San Francisco, State of California, the 29th day of August, A. D. 1914.

[Seal]

H. I. MULCREVY,  
Clerk.

By H. I. Porter,  
Deputy Clerk. [4]

State of California,  
City and County of San Francisco,—ss.

Emmett I. Donohue, being duly sworn, deposes and says: That he is, and was at the time of the service of the Summons herein referred to, a citizen of the United States, over the age of eighteen years, and not a party to the within entitled action; that he personally served the within Summons on the hereinafter named defendant, whom deponent knew to be the person named in said Summons by delivering to and leaving with —— of said defendant personally, at the places hereinafter set forth in the State of California, and at the time set opposition —— respective name—, a copy of said Summons attached to a copy of the complaint referred to in said Summons.



Names of Defendants Served.	Place where Served.	Time of Service.
THOMAS ALTON, General Manager of The San Francisco Breweries, Limited, a Corporation.	City and County of San Francisco.	September 1st, 1914.

EMMETT I. DONOHUE,

Subscribed and sworn to before me this 1st day of  
September, A. D. 1914.

[Seal]

FLORA HALL,

Notary Public in and for the City and County of San  
Francisco, State of California.

[Endorsed]: No. 58,860. In the Superior Court  
of the State of California, in and for the City and  
County of San Francisco. Sylvia A. Brainard vs.  
The San Francisco Breweries Limited, a Corpora-  
tion. Summons. Filed Sep. 2, 1914. H. I. Mul-  
crevy, Clerk. By H. Brunner, Deputy Clerk. [5]

---

*In the Superior Court of the State of California, in  
and for the City and County of San Francisco.*

No. 58,860—Dept. 5.

SYLVIA A. BRAINARD,

Plaintiff,

vs.

THE SAN FRANCISCO BREWERIES, LIM-  
ITED, a Corporation,

Defendant.

**Notice of Petition for Removal.**

To the Plaintiff Above Named and to Messrs. Harrison & Harrison, and Byron F. Stone, Esq., Attorneys for Plaintiff:

You and each of you will please take notice that the defendant The San Francisco Breweries, Limited, a corporation, will, at the courtroom of Department No. 5 of the above-entitled court, in the City Hall, No. 1231 Market Street, San Francisco, at the hour of ten o'clock A. M. on Friday, the 11th day of September, 1914, file a petition for the removal of the above-entitled cause to the District Court of the United States in and for the Northern District of California, Second Division, and at the same time will file a bond for such removal with good and sufficient sureties, all as provided for in Section 29 of the Judicial Code known as "Act of March 3, 1911, United States Statutes." Full, true and correct copies of said petition and bond are hereto annexed, marked respectively "Exhibit 'A' " and "Exhibit 'B,' " and by reference made a part hereof.

You are further notified that at said time and place said defendant The San Francisco Breweries, Limited, a corporation, will apply to the above-entitled Honorable Court that an order be then and there made accepting said petition and bond, requiring the clerk of the above-entitled court to prepare and certify a copy of the record in said suit, and directing the transfer thereof to said District Court of the United States in and for [6] the Northern District of California, Second Division.

Said motion will be based upon all the papers and files herein, including said petition and bond to be then filed, and will be made for the reason that plaintiff is now and was at the time of the commencement of the above-entitled action a resident and citizen of the State of California, and that said defendant is now and at all of said times was a resident and citizen of the United Kingdom of Great Britain and Ireland.

Dated the 10th day of September, 1914.

H. B. M. MILLER,

Attorney for Petitioner and Defendant, The San Francisco Breweries, Limited.

HOEFLE & MORRIS,

Of Counsel for Defendant.

**Order Shortening Time.**

Upon reading and filing the foregoing notice of petition and good cause appearing therefor, IT IS HEREBY ORDERED that the time within which said notice of motion may be served be and the same is hereby shortened so that if said notice of petition be served upon plaintiff's attorneys at any time prior to five P. M. on Thursday, the 10th day of September, 1914, such service shall be valid and of the same effect as if five days notice had been given.

Done in open court this 10th day of September, 1914.

MARCEL E. CERF,

Judge of the Superior Court. [7]



[Endorsed]: Due service and receipt of a copy of the within Notice this 10th day of September, 1914, is hereby admitted.

BYRON F. STONE, Jr.,  
Attorney for Plaintiff.

[Endorsed]: Filed Sep. 11, 1914. H. I. Mulerevy,  
Clerk. By H. Brunner, Deputy Clerk. [8]

---

“EXHIBIT A.”

*In the Superior Court of the State of California, in  
and for the City and County of San Francisco.*

No. 58,860—Dept. 5.

SYLVIA A. BRAINARD,

Plaintiff,

vs.

THE SAN FRANCISCO BREWERIES, LIM-  
ITED, a Corporation,

Defendant.

PETITION FOR REMOVAL OF CAUSE.

To the Honorable the Superior Court of the State of  
California, in and for the City and County of  
San Francisco:

The petition of The San Francisco Breweries,  
Limited, a corporation, the defendant in the above-  
entitled cause, respectfully shows:

That said action is a suit of a civil nature, of which  
the District Court of the United States in and for  
the Northern District of California, Second Divi-  
sion, has original jurisdiction, and has been brought  
and is now pending in this Honorable Court and has

not yet been tried, nor has the time within which this defendant is required by the laws of the State of California, or any rule or rules of this Honorable Court, to answer or plead to the complaint elapsed or expired, and the matter in dispute in said suit exceeds, exclusive of interest and costs, the sum and value of Three Thousand (3,000) Dollars;

That the plaintiff, at the time of the commencement of said action, was and now is a citizen of the State of California; that the defendant was at the time of the commencement of said suit, ever since has been, and now is, a corporation organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland and a citizen and resident [9] thereof, having its principal place of business in the City of London, in said United Kingdom;

That there are no other parties to said suit except said plaintiff and said defendant;

That by reason of the premises this *petition*, said defendant, desires and is entitled to have said suit removed from said Superior Court of the State of California in and for the City and County of San Francisco into the District Court of the United States in and for the Northern District of California, Second Division;

That the said District Court of the United States in and for the Northern District of California, Second Division, sitting at the City and County of San Francisco, is the District Court of the United States for the proper district, being the District Court of



the United States held in the district where said suit is pending;

Your petitioner presents herewith a bond with good and sufficient sureties as provided by statute that it will, within thirty days from the date of the filing of this petition, enter in said District Court of the United States a certified copy of the record of the above-entitled suit, and for the payment of all costs that may be awarded by said District Court of the United States in and for the Northern District of California, Second Division, if the said District Court of the United States shall hold that this suit was wrongfully or improperly removed thereto, and also for defendant's appearing therein,

WHEREFORE, your petitioner prays that this Court proceed no further herein except to make the order of removal as required by law, and accept this petition and the bond presented herewith, and direct a certified copy of the record herein to be made by [10] said Court as provided by law and as in duty bound.

H. B. M. MILLER,

Attorney for Petitioner and Defendant, The San Francisco Breweries, Limited.

HOEFLE & MORRIS,

Of Counsel for Said Petitioner.

State of California,

City and County of San Francisco,—ss.

Thomas Alton, being duly sworn, deposes and says:

That he is the general manager, agent and attorney in fact of the San Francisco Breweries, Limited,



a corporation, the defendant in the above-entitled action, and the petitioner in the above petition; that affiant has read said petition and knows the contents thereof and that the same is true of his own knowledge.

THOS. ALTON.

Subscribed and sworn to before me this 10th day of September, 1914.

[Seal]

W. H. PYBURN,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed Sept. 11, 1914. H. I. Mulcrevy, Clerk. By H. Brunner, Deputy Clerk. [11]

---

“EXHIBIT B.”

*In the Superior Court of the State of California, in  
and for the City and County of San Francisco.*

No. 58,860—Dept. No. 5.

SYLVIA A. BRAINARD,

Plaintiff,

vs.

THE SAN FRANCISCO BREWERIES, LIMITED,  
a Corporation,

Defendant.

BOND ON REMOVAL.

KNOW ALL MEN BY THESE PRESENTS:  
That The San Francisco Breweries, Limited, a corporation, as principal, and Leon E. Morris and R. C. Burnett, as sureties, are held and firmly bound unto Sylvia A. Brainard, the plaintiff in the above-entitled action, her heirs, executors and administrators,

in the sum of \$500, lawful money of the United States, for the payment of which well and truly to be made, we and each of us bind ourselves, and each of our heirs, executors and administrators and successors, jointly and severally, firmly by these presents.

Dated this 10th day of September, 1914.

The conditions of this obligation are such that whereas the said The San Francisco Breweries, Limited, a corporation, has applied, or is about to apply, to the above-entitled Superior Court for the removal of the above-entitled action therein pending to the District Court of the United States in and for the Northern District of California, Second Division, for further proceedings, upon the grounds in said petition set forth, and that all further proceedings in said action in said Superior Court be stayed;

NOW, THEREFORE, if said The San Francisco Breweries, Limited, a corporation, shall within thirty days from the date of the filing of said petition for removal enter in said District Court of the [12] United States in and for the Northern District of California, Second Division, a certified copy of the record in such suit, and shall pay all costs that may be awarded therein by said District Court of the United States in and for the Northern District of California, Second Division, if said last-named Court shall hold that said suit was wrongfully or improperly removed thereto, and shall also appear in said suit, then this obligation shall be void, other-

wise shall remain in full force and effect.

THE SAN FRANCISCO BREWERIES,  
LIMITED,

[Seal]

By THOS. ALTON,

General Manager, Agent and Attorney in Fact.

LEON E. MORRIS.

R. C. BURNETT.

State of California,

City and County of San Francisco,—ss.

Leon E. Morris and R. C. Burnett, the sureties named in the foregoing bond, being first duly sworn, each for himself deposes and says as follows: I am the same person whose name is subscribed to the foregoing bond, and I state I am a householder and resident of the City and County and State aforesaid, and that I am worth the sum of five hundred (500) dollars named therein as the penalty thereof, over and above all my just debts and liabilities, exclusive of property which is exempt from execution.

LEON E. MORRIS.

R. C. BURNETT.

Subscribed and sworn to before me this 10th day of September, 1914.

[Seal]

W. H. PYBURN,

Notary Public in and for the City and County of San Francisco, State of California. [13]

The above and foregoing bond is hereby approved.

Dated: September 11, 1914.

GEO. A. STURTEVANT,

Judge of the Superior Court.



[Endorsed]: Filed Sep. 11, 1914. H. I. Mulcrevy,  
Clerk. By H. Brunner, Deputy Clerk. [14]

No. 58,860.

Dept. 5.

TRANSFER.

SUPERIOR COURT, SAN FRANCISCO.

BRAINARD

vs.

SAN FRANCISCO BREWERIES.

COURT CASE.

IT IS HEREBY ORDERED that the above-entitled case be re-assigned to Department Eight for the hearing of further proceedings.

Dated September 11, 1914.

GEO. A. STURTEVANT,

Presiding Judge.

HARRISON & HARRISON,

Attorneys for Plaintiff.

HOEFLER & MORRIS,

Attorneys for Defendant.

REASON: Ord. of Removal only.

[Endorsed]: Filed Sept. 11, 1914. H. I. Mulcrevy,  
Clerk. By H. Brunner, Deputy Clerk. [15]

---

*In the Superior Court of the State of California, in  
and for the City and County of San Francisco.*

No. 58,860—Dept. No. 5.

SYLVIA A. BRAINARD,

Plaintiff,

vs.

THE SAN FRANCISCO BREWERIES, LIMITED,  
a Corporation,

Defendant.

**Petition for Removal of Cause.**

To the Honorable the Superior Court of the State of California, in and for the City and County of San Francisco:

The petition of The San Francisco Breweries, Limited, a corporation, the defendant in the above-entitled cause, respectfully shows:

That said action is a suit of a civil nature, of which the District Court of the United States in and for the Northern District of California, Second Division, has original jurisdiction, and has been brought and is now pending in this Honorable Court and has not yet been tried, nor has the time within which this defendant is required by the laws of the State of California, or any rule or rules of this Honorable Court, to answer or plead to the complaint elapsed or expired, and the matter in dispute in said suit exceeds, exclusive of interest and costs, the sum and value of Three Thousand (3,000) Dollars;

That the plaintiff, at the time of the commencement of said action was and now is a citizen of the State of California; that the defendant was at the time of the commencement of said suit, ever since has been, and now is, a corporation organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland and a citizen and resident thereof [16] having its principal place of business in the City of London, in said United Kingdom;

That there are no other parties to said suit except said plaintiff and said defendant;



That by reason of the premises this petitioner, said defendant, desires and is entitled to have said suit removed from said Superior Court of the State of California in and for the City and County of San Francisco into the District Court of the United States in and for the Northern District of California, Second Division;

That the said District Court of the United States in and for the Northern District of California, Second Division, sitting at the City and County of San Francisco, is the District Court of the United States for the proper district, being the District Court of the United States held in the district where said suit is pending;

Your petitioner presents herewith a bond with good and sufficient sureties as provided by statute that it will, within thirty days from the date of the filing of this petition, enter in said District Court of the United States a certified copy of the record of the above-entitled suit, and for the payment of all costs that may be awarded by said District Court of the United States in and for the Northern District of California, Second Division, if the said District Court of the United States shall hold that this suit was wrongfully or improperly removed thereto, and also for defendant's appearing therein.

WHEREFORE, your petitioner prays that this Court proceed no further herein except to make the order of removal as required by law, and accept this petition and the bond presented herewith, and direct a certified copy of the record herein to be made by



[17] said court as provided by law and as in duty bound.

H. B. M. MILLER,

Attorney for Petitioner and Defendant, The SAN  
Francisco Breweries, Limited.

HOEFLER & MORRIS,

Of Counsel for said Petitioner.

State of California,

City and County of San Francisco,—ss.

Thomas Alton, being duly sworn, deposes and says:

That he is the general manager, agent and attorney in fact of the San Francisco Breweries, Limited, a corporation, the defendant in the above-entitled action, and the petitioner in the above petition; that affiant has read said petition and knows the contents thereof and that the same is true of his own knowledge.

THOS. ALTON.

Subscribed and sworn to before me this 10th day  
of September, 1914.

[Seal]

W. H. PYBURN,

Notary Public in and for the City and County of San  
Francisco, State of California.

[Endorsed]: Filed Sep. 11, 1914. H. I. Mulcrevy,  
Clerk. By H. Brunner, Deputy Clerk. [18]

*In the Superior Court of the State of California, in  
and for the City and County of San Francisco.*

No. 58,860—Dept. No. 5.

SYLVIA A. BRAINARD,

Plaintiff,

vs.

THE SAN FRANCISCO BREWERIES, LIMITED,  
a Corporation,

Defendant.

**Bond on Removal.**

KNOW ALL MEN BY THESE PRESENTS:

That The San Francisco Breweries, Limited, a corporation, as principal, and Leon E. Morris, and R. C. Burnett, as sureties, are held and firmly bound unto Sylvia A. Brainard, the plaintiff in the above-entitled action, her heirs, executors and administrators, in the sum of \$500, lawful money of the United States, for the payment of which well and truly to be made, we and each of us bind ourselves, and each of our heirs, executors and administrators and successors, jointly and severally, firmly by these presents:

Dated this 10th day of September, 1914.

The conditions of this obligation are such that whereas the said The San Francisco Breweries, Limited, a corporation, has applied, or is about to apply, to the above-entitled Superior Court for the removal of the above-entitled action therein pending to the District Court of the United States in and for the Northern District of California, Second Division, for

further proceedings, upon the grounds in said petition set forth, and that all further proceedings in said action in said Superior Court be stayed;

NOW, THEREFORE, if said The San Francisco Breweries, Limited, a corporation, shall within thirty days from the date of the filing of said petition for removal enter in said District [19] Court of the United States in and for the Northern District of California, Second Division, a certified copy of the record in such suit, and shall pay all costs that may be awarded therein by said District Court of the United States in and for the Northern District of California, Second Division, if said last-named Court shall hold that said suit was wrongfully or improperly removed thereto, and shall also appear in said suit, then this obligation shall be void, otherwise shall remain in full force and effect.

THE SAN FRANCISCO BREWERIES,  
LIMITED,

[Seal] By THOS. ALTON,  
General Manager, Agent, and Attorney in Fact.

LEON E. MORRIS.

R. C. BURNETT.

State of California,

City and County of San Francisco,—ss.

Leon E. Morris and R. C. Burnett, the sureties named in the foregoing bond, being first duly sworn, each for himself depose and says as follows: I am the same person whose name is subscribed to the foregoing bond, and I state I am a householder and resident of the City and County and State aforesaid, and



that I am worth the sum of five hundred (500) dollars named therein as the penalty thereof, over and above all my just debts and liabilities, exclusive of property which is exempt from execution.

LEON E. MORRIS.

R. C. BURNETT.

Subscribed and sworn to before me this 10th day of September, 1914.

[Seal]

W. H. PYBURN,

Notary Public in and for the City and County of San Francisco, State of California. [20]

The above and foregoing bond is hereby approved.

Dated: September 11, 1914.

GEO. A. STURTEVANT,

Judge of the Superior Court.

[Endorsed]: Filed Sep. 11, 1914. H. I. Mulcrevy, Clerk. By H. Brunner, Deputy Clerk. [21]

---

*In the Superior Court of the State of California, in and for the City and County of San Francisco.*

No. 58,860—Dept. No. 5.

SYLVIA A. BRAINARD,

Plaintiff,

vs.

THE SAN FRANCISCO BREWERIES, LIMITED, a Corporation,

Defendant.

**Order for Removal of Cause.**

This cause coming on for hearing upon application of the defendant herein for an order transferring

this cause to the District Court of the United States in and for the Northern District of California, and it appearing to the Court that the defendant has filed its petition for such removal in due form of law, and that the defendant has filed its bond duly conditioned, with good and sufficient sureties, as provided by law, and said petition and bond being now filed with the above-entitled Court, and it appearing to the Court that this is a proper cause for removal to said District Court of the United States in and for the Northern District of California.

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that this cause be and it hereby is removed to the District Court of the United States in and for the Northern District of California, and the clerk of this court is hereby directed to make up a record in said cause for transmission to said United States District Court forthwith.

Done in open court this 11th day of September, 1914.

GEO. A. STURTEVANT,  
Judge of the Superior Court.

[Endorsed]: Filed Sept. 11, 1914. H. I. Mulcrevy,  
Clerk. By H. Brunner, Deputy Clerk. [22]

**[Certificate of County Clerk to Transcript of Record  
on Removal.]**

*In the Superior Court of the State of California, in  
and for the City and County of San Francisco.*

No. 58,860.

SYLVIA A. BRAINARD,

Plaintiff,

vs.

THE SAN FRANCISCO BREWERIES, LIM-  
ITED, a Corporation,

Defendant.

I, H. I. Mulcrevy, County Clerk of the City and County of San Francisco, State of California, and ex-officio clerk of the Superior Court in and for the said city and county, hereby certify the above and foregoing to be a full, true and correct copy of the record and the whole thereof in the above-entitled suit heretofore pending in said Superior Court, being the suit numbered 58,860, wherein Sylvia A. Brainard is plaintiff and The San Francisco Breweries, Limited, a corporation, is defendant, said record consisting of:

The complaint filed by said plaintiff in said suit on the 29th day of August, 1914; and summons Sept. 2, 1914.

The defendant's notice of petition for removal, filed by said defendant in said suit on the 11th day of September, 1914;

The order transferring cause made and filed on the 11th day of September, 1914;



The defendant's petition for removal of cause, filed on the 11th day of September, 1914;

The bond on removal of cause, filed on the 11th day of September, 1914; and

Order for removal of cause to the District Court of the [23] United States in and for the Northern District of California, made and filed on September 11, 1914;

All as appears on the files and of record in my office.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the Superior Court at my office in said City and County of San Francisco this 16th day of September, 1914.

[Seal]

H. I. MULCREVY,

Clerk.

By H. Brunner,

Deputy Clerk.

[Endorsed]: No. 15,793. United States District Court, in and for the Northern District of California, Second Division. Sylvia A. Brainard, Plaintiff, vs. The San Francisco Breweries, Limited, a Corporation, Defendant. Certified Copy of Record. Filed Sep. 16, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [24]

*In the United States District Court, Northern District of California, Second Division.*

SYLVIA A. BRAINARD,

Plaintiff,

vs.

THE SAN FRANCISCO BREWERIES, LIMITED,  
a Corporation,

Defendant.

**Answer.**

Now comes the defendant, The San Francisco Breweries, Limited, a corporation, and, answering the complaint heretofore served and filed herein, admits, alleges and denies as follows, to wit:

**I.**

As to the paragraph in said complaint numbered I, this defendant admits that it is, and at all the times in the complaint stated was, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, and at all said times was and now is doing business in the State of California.

**II.**

As to the paragraph in said complaint numbered II, this defendant admits that, during a part of the day of the 29th day of May, 1914, in the City of Oakland, County of Alameda, State of California, it had under its control and management, and was using in and about the regular course of its business, a certain delivery wagon, and a team of two horses by which the said delivery wagon was drawn; but this

defendant denies that, on that date or at any time or at all, it had in its employ a certain or any unskillful or incompetent or careless servant named Harry Crow, or of any name whatever, who was employed by the defendant as a driver, or in [25] any capacity, or who, on said 29th day of May, 1914, or at any time, in or about the business of the defendant or within the scope of his said or any employment, was engaged in driving said or any horses or anything whatever.

### III.

As to the paragraph in said complaint numbered III, this defendant denies that, on the 29th day of May, 1914, or while said or any horses and said or any delivery wagon, or either thereof, were under the control or management of the defendant, or at any time or at all, the said Harry Crow, or any employee of the defendant, so or at all unskillfully or carelessly or negligently conducted himself in or about the driving or management of said or any horses which were then and there or at all harnessed to said or any delivery wagon, or in or about anything whatever, that said or any horses, by reason of the unskillfulness or carelessness or negligence of said Harry Crow, or of any employee of this defendant, took fright or escaped from his or their control or ran away, drawing after them said or any delivery wagon or anything else.

### IV.

As to the paragraph in said complaint numbered IV, this defendant denies that the plaintiff, immediately or at all after said or any horses escaped from



the control of said Harry Crow, or from the control of any employee of this defendant, either as alleged in said complaint or otherwise, was lawfully, or in the exercise of due or any care, or otherwise or at all, on the sidewalk at the northwesterly corner of the intersection of Twentieth Street and Broadway in said City of Oakland or elsewhere; and this defendant denies that, by reason of said or any negligence of the defendant, or of any employee of the defendant, the plaintiff, while on said or any sidewalk or elsewhere, or without any fault on her part or otherwise or at all, was violently or at all struck [26] by said or any runaway horses or anything whatever, or was thrown down or kicked or trampled on by them, or that she thereby, or because of any negligence of this defendant or of any of its employees, sustained a compound comminuted fracture, or any fracture, of her left or either thigh, or that the knee joint of her left or either leg was crushed, or her right or either leg was cut or bruised, or that she sustained various or any other injuries, or was made sick or sore or bruised or lame; and this defendant denies that the plaintiff, by reason of said or any negligence of the defendant, or of any of its employees, or by reason of being struck or thrown down or kicked or trampled on, either as alleged in said complaint or otherwise, has been, ever or at all since the 29th day of May, 1914, or since any time, or still is, sick or sore or bruised or lame, or is or will be permanently lame; and this defendant denies that, by reason of said or any injuries sustained by the plaintiff by or through any negligence whatever on the

part of this defendant or any of its employees, the plaintiff's left or either knee is or will be permanently or at all stiff, or that her left or either leg is or will be permanently or at all shorter than her right leg; and this defendant denies that, by reason of any negligence of the defendant or of any of its agents, servants or employees, the plaintiff has been or is damaged in the sum of \$25,000.00, or any sum whatever; and this defendant alleges that it has no knowledge, information or belief as to the nature or extent of any injuries received by, or damages caused to, the said plaintiff, and therefore and on that ground it denies that the said plaintiff ever or at all was injured, either as in said complaint alleged or otherwise, or that she ever was or is at all damaged in the sum of \$25,000, or in any sum whatever.

WHEREFORE this defendant prays that this action be dismissed as against it, and that it be granted its costs and disbursements [27] herein.

H. B. M. MILLER,  
Attorney for Defendant.

HOEFLE & MORRIS,  
Of Counsel.

State of California,  
City and County of San Francisco,—ss.

Thomas Alton, being first duly sworn, deposes and says:

That he is an officer of the defendant corporation, to wit, general manager thereof, and makes this verification for and on behalf of said corporation defendant; that he has read the foregoing answer and knows the contents thereof, and that the same is true



of his own knowledge, except as to the matters therein stated upon his information or belief, and that as to those matters he believes it to be true.

THOS. ALTON.

Subscribed and sworn to before me this 10th day of November, 1914.

[Seal]

W. H. PYBURN,  
Notary Public in and for the City and County of San Francisco, State of California.

Due service and receipt of a copy of the within answer is hereby admitted this 10th day of November, 1914.

HARRISON & HARRISON,  
BYRON F. STONE,

Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 10, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [28]

---

*In the United States District Court, Northern District of California, Second Division.*

No. 15,793.

SYLVIA BRAINARD,

Plaintiff,

vs.

THE SAN FRANCISCO BREWERIES, LIMITED, a Corporation,

Defendant.

**Verdict.**

We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of



Eight Thousand (\$8,000) and no/100 Dollars.

FRANK W. MARSTON,

Foreman.

[Endorsed]: Filed April 15, 1915. Walter B. Maling, Clerk. [29]

---

*In the District Court of the United States, in and for  
the Northern District of California, Second  
Division.*

No. 15,793.

SYLVIA A. BRAINARD,

Plaintiff,

vs.

THE SAN FRANCISCO BREWERIES, LIM-  
ITED, a Corporation,

Defendant.

### **Judgment on Verdict.**

This cause having come on regularly for trial upon the 13th day of April, 1915, being a day in the March, 1915, Term of said court, before the Court and a jury of twelve men, duly impaneled and sworn to try the issue joined herein; Stanley Moore, Harrison & Harrison, Byron F. Stone and George R. Ford, Esqrs., appearing as attorneys for plaintiff, and H. B. M. Miller and William Rix, Esqrs., appearing as attorneys for the defendant; and the trial having been proceeded with on the 14th and 15th days of April, all in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed and the cause, after

arguments by the attorneys, and the instruction of the Court, having been submitted to the jury, and the jury having subsequently rendered the following verdict, which was ordered recorded, viz: "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Eight thousand (\$8,000) and no/100 Dollars. Frank W. Marston, Foreman"—and the Court having ordered that judgment be entered in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Sylvia A. Brainard, plaintiff, do have and recover of and from The San Francisco Breweries, Limited, a corporation, defendant, the sum [30] of Eight thousand and 00/100 (\$8,000.00) Dollars, together with her costs in this behalf expended taxed at \$52.80.

Judgment entered April 15, 1915.

WALTER B. MALING,  
Clerk.

A True Copy. Attest:

[Seal] WALTER B. MALING,  
Clerk.

[Endorsed]: Filed April 15, 1915. Walter B. Maling, Clerk. [31]

**[Certificate of Clerk U. S. District Court to  
Judgment-roll.]**

---

*In the District Court of the United States for the  
Northern District of California.*

No. 15,793.

SYLVIA A. BRAINARD,

vs.

THE SAN FRANCISCO BREWERIES, LTD., a  
Corp.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 15th day of April, 1915.

[Seal]

W. B. MALING,  
Clerk.

By J. A. Schaertzer,  
Deputy Clerk.

[Endorsed]: Filed April 15, 1915. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.



*In the District Court of the United States for the  
Northern District of California, Second Division.*

No. 15,792.

SYLVIA A. BRAINARD,

Plaintiff,

vs.

THE SAN FRANCISCO BREWERIES, LTD., a  
Corporation,

Defendant.

**Defendant's Engrossed Bill of Exceptions.**

BE IT REMEMBERED that this cause came on regularly for trial before the Honorable WILLIAM C. VAN FLEET, Judge of the above-entitled court, sitting with a jury, and was tried on the 13th, 14th and 15th days of April, 1915, Messrs. Harrison & Harrison, Byron F. Stone, Esq., George K. Ford, Esq., and Stanley Moore, Esq., appearing as attorneys for the plaintiff, and H. B. M. Miller, Esq., and William Rix, Esq., appearing as attorneys for the defendant, and the following proceedings were had and testimony taken.

The jury was duly and regularly empanelled to try said cause, and thereupon Mr. Moore made an opening statement to said jury on behalf of the plaintiff.

**[Testimony of Charles Thun, for Plaintiff.]**

Mr. CHARLES THUN was then called as a witness on behalf of the plaintiff and, on being first duly sworn, testified as follows, to wit:

To Mr. MOORE.—My name is Charles Thun; I

(Testimony of Charles Thun.)

live at 701 Fallon [33—1] Street in the City of Oakland, and, on the 29th day of May, 1914 I had a boarding stable. I run a kind of service stable at 207 Washington Street, close to Second, and on that day I rented a team to the Wieland Brewery Company. I remember that day; the day before that they called me up and asked me if I had a team I could rent; I told them I had one, that it was a free team and I did not like to let everybody have it; they said they would take good care of it. By free team I mean a free team in traveling. I suppose it was the manager that called me up, I do not know his name; I know him when I see him. I took the team over there the next morning at seven o'clock and saw the man, I suppose it was, that was taking care of the barn; I told him about it; I do not know his name; he was the man I saw there taking care of the barn. I told him the team had done nothing for a couple of days, to be a little careful with them because a team that does not do anything for a couple of days, they are feeling quite full of life and a person cannot trust them any. He said he would look after that, and I left the team there. They told me to telephone them and find out whether they wanted the team the next day; I called them up on the phone about half-past three, and they told me to come over and get them about half-past five, and I went over to get them at that time. I rang up about half-past three, as near as I can remember; I got there about half-past five, and the team was standing in the yard hooked to the wagon. By the word yard I mean



(Testimony of Charles Thun.)

kind of a shed or floor boarded up from the outside; there is a door where they drive in and out through.

There were then introduced in evidence on the part of the plaintiff three pictures of the premises of the defendant, which were marked respectively "Plaintiff's Exhibits 1, 2 and 3" which pictures were admitted to be correct representations of [34—2] said premises generally, and one picture of the corner of Broadway and Twentieth Street where the accident happened to plaintiff, marked as "Plaintiff's Exhibit 4."

(Witness continuing.) When I got there about half past five in the evening, the team was standing there in the yard, back aways from the door in "Plaintiff's Exhibit No. 1," over which I have marked an X, about twenty or thirty feet back I think. While on each of the two pictures shown me one of the doors is shown as closed, at the time of the accident both doors were open; the horses were headed toward Broadway as they were standing hitched to the wagon.

Q. (By Mr. MOORE.) When you got there upon that occasion and saw the team standing there, will you state whether or not they were tied back or hitched back when you first went in?

A. Well, I never paid no attention to it whether they were or not.

Q. Did you notice at the time you first went in there, or before the team started off, whether or not the reins were fastened back at the seat?

A. Well, I came from in back of the wagon and I



(Testimony of Charles Thun.)

never noticed whether they were hitched back to the seat or not.

Q. What did you do when you came in there about half past five that afternoon? What did you do and where did you go?

A. Well, when I came in there and they says, "There's your team." He said, "Hold on and we will unhitch 'em for you." Then the driver and me started up toward the wagon and I started for the office to make a settlement of the day's work and he started to unhook them, and I started in the doorway and they started off.

(Witness continuing.) When I said "they said they would unhitch them for me," I meant one of the attendants there. When [35—3] I brought the horses there in the morning I did not hitch them to the wagon; I think the driver and the fellow who was taking care of the barn did; I would not say for sure which one it was; any way, it was the people who were working for the brewery. It was the driver who said "we will unhitch them."

Q. (By Mr. MOORE.) You stepped to the office to settle for the time of the team, did you?

A. Yes, sir.

Q. Whereabouts is the office?

A. It is right close to Broadway, it is right in from Broadway.

Q. Could you show on one of these pictures here where the location of that office is?

A. Right here.

(Testimony of Charles Thun.)

Mr. MOORE.—For the benefit of the record, the witness calls attention to a small doorway of ordinary size, that is shown in the picture and that is marked with the figures “1931,” being this doorway right here, gentlemen.

(Witness continuing.) That is not the doorway I went in; I went in from the back. There is a door into this office off the main floor of the brewery, and it was by means of that that I was approaching the office.

Q. (By Mr. MOORE.) As you were walking over in the direction of that doorway, what, if anything, did you see the driver do, or where, if anywhere, did you see the driver go?

A. We both came up to the wagon and I turned in back of the wagon to go into the door, and he went on up to the team; that is the last I seen of him until the team started.

Q. When you were going toward the door, was the driver ahead of you or behind you?

A. We were walking side by side.

Q. Will you state whether or not you saw the driver at the [36—4] front wheel or step of the running board at any time?

A. No, sir, I could not say that I did not see it.

Q. Which side of the wagon were you on at the time the team started?

A. I had been on the left side; I just stepped on the door-sill when they started.

Q. And which side of the team was the driver on at that time? A. On the right side.



(Testimony of Charles Thun.)

Q. (By the COURT.) On the opposite side from where you were? A. Yes, sir.

Q. Where was the driver next when the team started? Where was he? Was he on the floor or where?

A. He had got out as far as the sidewalk; that was the next place I saw him.

Q. (By Mr. MOORE.) Where was the team at that time? A. The team was out on the street.

Q. Did you see the team start to go out on the street?

A. Well, it was done so quick, I could not see very much of it until they got just out of the door.

Q. Now, I want to ask you where the reins were at that time, and whether the reins were tied back, or whether the reins were dragging at the time they got out into the street and you were able to get a good look at them?

A. When I got a good look at them the accident happened, it had already happened.

Q. You saw them, didn't you, when they were out on the street and before the accident happened?

A. I seen them running, yes.

Q. Where were the reins then?

A. Well, I could not swear to just where they were then, [37—5] because I was too far behind.

Q. Don't you remember whether they were on the wagon at that time or were dragging?

A. No, sir; you see I was behind the wagon, I could not see ahead of the wagon.

Q. When you first saw the driver after the team



(Testimony of Charles Thun.)

started off, was the driver standing up or was he lying down?

A. He was lying down on the sidewalk.

Q. (By the COURT.) As though he had fallen over or been knocked over?

A. Fallen or knocked over, I could not say which.

Q. (By Mr. MOORE.) Did you see the team as it went out of the gate?

A. I seen them after they started, they got out through the door.

Q. You heard them start and you looked around, did you?

A. Yes; and when I looked around you could say they were between the outside of the door and in the door.

(Witness continuing.) When I last saw the driver he was lying on the sidewalk outside of the door; I never paid must attention to him; I ran toward the team; I did not stop to notice if the driver was still lying on the sidewalk. It is pretty hard to tell how fast the team were running; they were running very fast, they were at a full gallop; I ran after them but could not run as fast as they could; when they ran out they ran toward Twentieth Street, about one-half a block from the doorway of the brewery, I think about 250 feet; at the time I got to the team they were right on the corner on the sidewalk shown in "Plaintiff's Exhibit 4," and the plate glass on the sides of the doorway, they were broken; the skull of one of the horses was fractured and a policeman shot him. [38—6]

(Testimony of Charles Thun.)

Q. (By Mr. MOORE.) By this time the young lady had been taken away, had she?

A. She was taken away before; I never saw her; to-day is the first time I have ever seen her.

Q. When that team was going down the street from the doorway into the barn, when you saw them running down Broadway toward Twentieth Street, were the hind wheels of the wagon turning round?

A. Yes, sir.

Cross-examination.

Q. (By Mr. MILLER.) How far could you see the wagon at the time you looked and saw the wheels turning?

A. About a hundred feet.

Q. And the wagon was directly in front of you and was going away, wasn't it?

A. Yes.

Q. So you did not have a side view of it at all?

A. No, I could see the back part of the wagon.

Q. Do you remember of looking particularly and seeing that those wheels were turning?

A. Well, I seen the whole wagon.

Q. You saw the wagon going, but did you look particularly and see those wheels turning?

A. A person does not have to do that.

Q. I am asking you, did you look, and can you say now that you saw those wheels turning?

A. I didn't particularly just look at the wheels, because I was looking at the wagon.

Q. You saw the wagon going and you looked ahead, but you don't know, as a matter of fact, whether the wheels were turning or whether they were not, do you, of your own knowledge?



(Testimony of Charles Thun.)

A. Why, sure, a man can see that. [39—7]

Q. I am asking you if you did. Do you remember now having looked at that wagon and seeing that the wheels were turning?

A. Yes, I could see that the wheels were turning.

Q. What was it particularly that directed your attention on the wheels to see if they were turning?

A. There was no particular attention at all.

Q. You were somewhat excited, were you not?

A. Well, not very much excited; I am a man who never gets excited very much.

Q. You never get excited; you saw the team and they were going at a gallop, were they? A. Yes.

Q. And they were going away from you and were a hundred feet in front of you? A. Yes.

Q. And you remember now distinctly you saw the wheels turning? A. Yes, I saw the wheels turn.

(Witness continuing.) When I first went down to the Breweries place in the morning, the horses were harnessed up. I harnessed them in my barn and drove them down there; I don't remember whether I went into the entrance next to Twentieth Street or the one nearest 19th Street. When I drove the horses in there in the morning, the wagon was standing where they were standing in the evening; it was somewhere around there; when I got there in the evening, the horses were standing at the platform in the yard, about twenty or thirty feet back from the street with their heads facing Broadway or to the front of the building; it was not to Mr. Crow that I delivered the horses in the morning; it



(Testimony of Charles Thun.)

was another man; when I delivered them to him I immediately went away; both Mr. Cooper and Mr. McKinnon were there when I delivered the horses in the morning, but I don't know which one of them took the horses; when I went after the horses in the evening [40—8] these two men and Mr. Crow, the driver, were all there; when I went in I asked them if they were through with the team; I didn't ask any particular one; three of them were there. When someone in the Brewery phoned to me about getting the team, they asked me if I had a team to rent, and I said yes, I had; they wanted to know if it was a good team, and I said yes, it was a lively team.

Q. (By Mr. MILLER.) Did you tell them that it was a team that was wild and was liable to run away? A. Not wild.

Q. I say, did you tell that to the man?

A. I said to be careful with them, because they had not been doing anything for three days.

Q. Do you know to whom you talked?

A. The three men were there.

(Witness continuing.) I suppose it was Mr. Walker I talked with over the phone; I did not see him when I took the horses over in the morning, and I just started into the office to talk to him when I went after the team at night. When I took the horses over in the morning, I told the three men that were there to be careful with the horses, because they had not worked for three days and to watch out a little for them; the three men I saw were the two I have just seen, that is, Mr. Cooper and Mr. McKin-

(Testimony of Charles Thun.)

non, and the driver Mr. Crow; and when I told them that all three of them were together. I handed the lines over to one of them and they took the horses and hitched them up. I did not stand watching them; I went back to my business. I did not have time to stay there all day watching them.

Q. (By Mr. MILLER.) When did you find out where the office was?

A. They had horses from me the year before.

Q. (By the COURT.) They had rented horses from you before? A. Yes, the year before.

Q. (By Mr. MILLER.) So you knew where the office was, up at the front of that building with the entrance on Broadway? A. Yes, sir. [41—9]

(Witness continuing.) When I went around there that night to get the horses, I started for the office from in back of the wagon; I didn't go into the office, but went back into the shed; I think I went into the entrance nearest Nineteenth Street.

Q. (By Mr. MILLER.) Now, is it not a fact, Mr. Thun, that when you went there in the evening for the team, you went in this entrance nearer Nineteenth Street clear back to the back end around by the stable; is not that the way you went in?

A. Yes, sir.

Q. And, when you got to the stable you saw three men there? A. Yes, sir.

Q. Did not one of these men say to you, pointing up toward the front of the place, "There's your team, it is ready for you"?

A. Yes, they said that.



(Testimony of Charles Thun.)

Q. After they said that, you stayed around for a few minutes and talked with them, did you not?

A. Well, I don't know about a few minutes, a minute or two.

Q. But you did stand for a moment and talk?

A. Yes, sir.

Q. There was a horse being doctored or being fixed up in the stable there at the time?      A. Yes, sir.

Q. And you were somewhat interested in that and watched it for a few minutes and you talked with them?      A. Yes, sir.

Q. After doing so, did you not state, in the presence of each of these men, or in the presence of all of them we will say, "Well, I guess I'll unhitch and go home"?

A. Yes, I said, I guess I'll have to unhitch and then go home.

Q. And when you said that you started to go back here by the stable and walked up toward where the horses and wagon were?

A. Yes; and Crow went with me. He said, "I'll unhitch them for you." And it was his place to unhitch them anyhow. [42—10]

Q. When you did state "I'll unhitch them and go home," you started to walk towards them, did you not?      A. Yes, sir.

Q. After you started to walk toward them, and when you were probably ten feet on your way, did not Mr. Crow then say to you, "Well, I'll be a good fellow and help you"?

A. No, he did not say no such thing.



(Testimony of Charles Thun.)

Q. Did he say anything similar to that?

A. He said, "I'll unhitch them."

Q. That he would unhitch them?

A. Yes, and then we both walked up toward the wagon.

Q. He said he would unhitch them after you had said you would unhitch them and go home?

A. Yes, sir.

Q. And you walked on toward the wagon?

A. Yes, sir.

Q. Didn't you go up to the side of the wagon before he did?     A. No, sir, I didn't.

Q. This wagon was standing very close to this small platform, was it not?

A. The hind wheels were standing right by the door.

Q. Were the hind wheels standing as far back as the back end of the platform?

A. The hind wheels were standing right opposite the door so that there was room between the door and the wagon to get inside the door.

Q. (By the COURT.) What door are you speaking of?

A. Next to Broadway, the back door that goes into the store shed.

(Witness continuing.) There was no platform there, it was just a step; at the time I went on in front toward those horses I didn't go up to the horses at all; the hind wheels of the wagon were standing opposite that door and there was room enough behind [43—11] the wagon to walk in the door; he went up

(Testimony of Charles Thun.)

to the horses and I stopped in that door; I got as far as the doorsill and then the horses started away.

Q. When the horses started, do you know where Mr. Crow was? Did you see him?

A. No, I didn't see him until he was on the sidewalk like I repeated once before.

Q. You didn't see him get up on the wagon at all?

A. No, sir, I didn't.

Q. And you did not see him loosen any lines that were fastened to the seat at all?

A. No, sir, I didn't.

#### Redirect Examination.

They rented one horse from me the year before; they took good care of him, and so I let them have a team again; when I rented them the horse before, I got my pay from the gentleman with the red hair; I had been in that office on those occasions.

#### [Testimony of Miriam Hollister, for Plaintiff.]

MIRIAM HOLLISTER, was then called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows, to wit:

My name is Miriam Hollister; I reside in Oakland, at the Fabiola Hospital; am a student nurse there and was such in the month of May last; I am acquainted with Miss Brainard; she was also a student nurse there in May, 1914; I recollect leaving the hospital with her on the 29th of May, 1914, about 5:30. The hospital is at Moss Avenue and Thirty-eighth Street. When we left there we walked along Broadway toward Oakland; when we got to Twentieth and



(Testimony of Miriam Hollister.)

Broadway we saw a team coming, when it was about a rod off I imagine, just at the corner across the street; we were on the sidewalk and we turned; the team were running toward us at a full gallop; we turned and ran. I went back to [44—12] Broadway and Miss Brainard ran in the entrance of this store on the corner; it was all just in a moment, and I heard her scream, and I looked around and the team was on her; she was down.

“Plaintiff’s Exhibit No. 4” was then shown to the witness and was identified by her as the place where the accident happened to Miss Brainard.

(Witness continuing.) Miss Brainard was between the posts shown there and the building, lying down, and the team was right there also; one horse was down and had slid up right close to the building; Miss Brainard was conscious and was trying to get out; she was right under the horse, under his feet; she was right in the position where this man is in Plaintiff’s Exhibit 4; when we first saw the team, the team came very rapidly.

**[Testimony of Sylvia A. Brainard, for Plaintiff.]**

SYLVIA A. BRAINARD, the plaintiff, was then called as a witness on her own behalf and, on being first duly sworn, testified as follows, to wit:

To Mr. MOORE.—My name is Sylvia A. Brainard; I live at 2609 Grove Street, in Berkeley, with my father and brother; in May, 1914, I was living at the Fabiola Hospital; I was a student nurse there; I am thirty years old, and had been training as a nurse seventeen months at the time of the accident; I recol-



(Testimony of Sylvia A. Brainard.)

lect leaving the hospital with Miss Hollister, and I think we left the hospital a little after 5:00 P. M. to go down to Oakland; we walked down Broadway; just as we arrived at the corner of Broadway and Twentieth Street we saw this team just on the opposite corner crossing, not quite at the corner when we first saw it, and we turned to run; the team appeared to be travelling just about as fast as it could go. I turned and ran to this doorway (pointing to the doorway on the corner of Twentieth and Broadway shown in "Plaintiff's Exhibit 4"); I just got in the doorway and did not have time to [45—13] turn around when I felt the horse kick me, and I fell and felt them trampling on my knees; I was not unconscious; I remember lying upon the sidewalk and them pulling me from under the horse; there were two or three men there that rushed up right then and pulled me from under the horse and put me in the machine, and I was taken directly to the Fabiola Hospital, where I remained six months. I was injured on the 29th day of May, 1914, and was discharged from the hospital November 17th, 1914; during that time I was confined to my room for the entire period, all excepting the last week; then I was up on crutches trying to walk; I was then taken to my brother's home, 2415 Webster Street, in Berkeley; I could not get about at all excepting about the house on my crutches; I remained there from November until about the first week in January of this year, when I was taken to my own home, my father's home, and I have remained there ever since; I have been very

(Testimony of Sylvia A. Brainard.)

closely confined; I am not able to get out at all alone, and then only in a machine; I am not able to get into the cars yet; when I go up or down steps I must have someone to help me; I have no use whatever of the left limb; there is almost a constant ache in it, I would not call it pain, it is an ache all the time, sometimes more severely than others; it occurs always at night; it is very uncomfortable at night-time. It is also most painful when I have been lying down or sitting down and trying to get up; it is very difficult to change my position; I have to help my knee to move it, I cannot move it without lifting it; the aching is right in the knee. Since the operation was performed on my limb the day I was injured, there has been one other operation; this was August 7th, 1914. Dr. Cunningham performed these operations, and Dr. Sutherland assisted him; I do not know anything about the operations; I was under an anaesthetic. [46—14] I have the bill for the hospital, \$833.38; the doctor's services are not paid yet; I understand he has to again operate on the knee before it will stop draining; it has drained constantly ever since the time of the injury and is in that condition at present; I have paid nothing toward the doctor's services; I don't know the amount of the doctor's bill.



**[Testimony of Arthur L. Cunningham, for  
Plaintiff.]**

ARTHUR L. CUNNINGHAM was then called as a witness on behalf of the plaintiff and, on being first duly sworn, testified as follows, to wit:

My name is Arthur L. Cunningham; I reside in Oakland; I am a physician and surgeon and have been engaged in the practice of my profession in Oakland for twenty-five years. I am acquainted with the plaintiff in this action and have known her about one and a half or two years; in the latter part of May, last year, she was a member of a class of seventy-two girls at the Fabiola Hospital studying to become a nurse. The first time she became a patient of mine was in the latter part of May, 1914; I saw her somewhere about seven o'clock on the evening that she was hurt, at the Fabiola Hospital, and made an examination of her on that occasion, and found that the left thigh was crushed just above the knee joint; the soft tissues overlying the bone were lacerated two or three inches; spiculas of bone were lying in the bottom of the wound; the giant bone was crushed into three fragments, the center fragment was torn from it and turned upwards; the articulating surface of the knee joint was turning upwards; at the upper portion of the thigh bone was a long, narrow spicula, so that the two ends would barely lap with some shortening; the right leg sustained some soft tissues crushed, requiring quite a good many stitches and drainage; there were bruises and contusions of minor importance; the left thigh



(Testimony of Arthur L. Cunningham.)

bone, that would be the big bone that [47—15] runs from the knee joint up into the hip socket, that was broken in five or six places; the bone was split up its shaft; there were three fragments in the articulating surface of the bone. I have X-rays that show these fragments, and the first set was taken, I think, about four or five days, within a week, after the injury; two of these plates were taken within a week of the injuries; they show not only the nails as they were driven into the bone, but they also show the screws and the wires around the bone and then the two drainage tubes; these nails were driven into the bone to hold the fragments together; they are there yet. The first X-ray photos were taken after the operation had been performed; the knee joint was all fractured into three fragments; here (pointing to one of the X-ray photos first taken) is a drainage tube; these two spiculas as they came together here were fastened together by tiny screws and then wires put round them; the nails that appear in this X-ray picture, they were used as a part of the operation and were driven in to hold the fragments of the joint together; those nails are still there; this (pointing to photo) is wire that was twisted around the fragments.

The COURT.—I think, Mr. Moore, it may be well to have the doctor explain to the jury the occasion that gives rise to this operative treatment and also the general method, where there is a comminuted fracture, of securing the parts together in proper position.

(Testimony of Arthur L. Cunningham.)

A. The methods pursued are with screws or with nails or wires or sutures; these fragments were in the softer tissues of the bone; they were small fragments.

The COURT.—Just a moment, Doctor. Mr. Moore, those should not be presented to the jury until they are offered in evidence. (Referring to X-ray photos which Mr. Moore was showing to the jury.)  
[48—16]

Mr. MOORE.—Yes, your Honor; I offer them.

(Witness continuing.) These condyles, so-called, or the large portions of the bone, were so fractured that it left three fragments, and, in order to hold those three fragments, we took long silver nails and drove them right through; that held them in position; besides that, the thigh bone was fractured obliquely, and portions of the bone were crushed: I removed quite a number of fragments; still there were oblique areas, like my pencil might be, and these wires we put around them to hold the little screws together; that is shown in the latest pictures; the screws and bands were subsequently removed; after the bones had become sufficiently united so we could remove the foreign bodies, we took them out, but we never took out the long nails, they can be permitted to always remain there; here is the picture showing them (referring to one of the X-ray photos). This picture I took last week; there is no inflammation there.

Q. (By Mr. MOORE.) To what extent, if any,



(Testimony of Arthur L. Cunningham.)

was there a shortening in this limb, or how much shorter is this left limb than the right?

A. I think my last measurements gave me about an inch.

(Witness continuing.) I think the limb was kept encased in a plaster of Paris cast in the neighborhood of five months.

Q. Was there a second operation performed on the limb?

A. Only to remove these screws and wire bands.

Q. And that was some two or three months after the receipt of the injury? A. It was.

Q. (By the COURT.) What sort of union did you secure, Doctor?

A. Well, your Honor, I believe the union to be very good considering the nature of the injury; there is a small sequestra of bone right near the edge of the wound that is somewhat discharging [49—17] a little through a small sinus, a small opening. These last plates show a great deal of bone thrown out all around the injury.

Q. The age of the patient was such, that is, being young, as to afford a ready process of nature?

A. It was all in her favor, everything; she lost a great deal of blood from this, necessarily. If she had not been young she would not have survived it, I don't think.

Q. Have you secured what you would call a good result, that is, a comparatively good result?

A. Yes, Judge, I think so, very.



(Testimony of Arthur L. Cunningham.)

(Witness continuing.) I think it will be necessary for her to remain under treatment for about three months more; I think it will be a full year from the date of her injury before she will be well; the reason it would be necessary to give her treatment for another three months is that there is an area, the covering of the bone, the periosteum was denuded, torn off, and that little portion is broken away loose from the bone; it is called a sequestra; this discharge through a little opening, a sinus, that has to be looked after and kept clean, and possibly removed a little later by a small minor operation; that can be done at any time when she has time for it; I think it ought to be done pretty soon now. The drainage has been continuous, but very, very minor for, I suppose, the last five months—as soon as we removed the drainage tubes, which I think was two months after; there is some drainage going on there now through a very small little opening which nature has provided; nature keeps that open until this foreign matter is entirely thrown out. I was assisted in the case, or in the operations that have been made, by the interne at the Fabiola Hospital, Dr. Sutherland; he assisted me that [50—18] night with the aid of the regular operating staff, which consists of special nurses. The operation that was performed I think is the usual surgery for injuries of this kind, but such fractures as that are not of common occurrence; you do not require operative treatment for a simple fracture, but this was an extensive laceration and extensive fracture; we were obliged to make

(Testimony of Arthur L. Cunningham.)

further incisions in the leg so as to get at it, but those were placed in proper apposition and stitched, and they grew right together again.

Q. (By Mr. MOORE.) Why is it, Doctor, that, with that bony union set up there, there is such a long period of disability in a fracture of this kind?

A. It is hard to explain that. These bones were fractured obliquely and only the tip of them could be brought together that allows the bony salt to circulate through the bony canals, and if they can get that soft area of circulation nature will deposit bone all around it, beginning from each end of the bone at the bottom and building up; in this particular case that took a long time, partially because of the small, oblique areas lying together, and also because there was so much damage done to the soft tissues about it, and it had to be treated as an open fracture with drainage tubes.

Q. This treatment, if it continues for three months, will practically have extended over fourteen months, this injury occurring on May 29th, 1914, will it not, Doctor?      A. It will.

(Witness continuing.) I have not put in my bill for professional services, but have been requested so to do; I should say the operative work is worth in the neighborhood of \$500.00, and the subsequent attendance is worth at least \$250.00; that would be a matter of \$750.00 to date, and would be a very reasonable [51—19] bill. There will always result the shortening of the leg which I spoke of as about an inch, and there is no way to get around that, and



(Testimony of Arthur L. Cunningham.)

there will always *been* some impairment in the gait of the patient, she will never have more than ten per cent of motion in her knee because the fracture of the thigh bone extended into the knee joint, she will always have a stiff knee, a very stiff knee.

Q. So far as her continuing in the occupation of a trained nurse, Doctor, would she be suited to that occupation?     A. No.

Q. Would she be suited to any occupation that involved much physical labor, which included the standing upon her feet for any long time?     A. No.

Q. Why not?

A. Because, I should think, of the shortening in the first place rocking the hips out of position; in the second place, because it would be a number of years before she would get strength in that bone and muscle; the injury done to the soft parts alone would make it weak for a long period of time.

Q. What do you refer to when you say because of the rocking of the hips out of place?

A. In the shortening of the leg, that is going to rock the hips to meet that shortening.

Q. And is that liable to affect anything so far as the spine is concerned, or accomplish any curvature there?     A. Yes, it will twist the spine.

Q. Is there not any way to counterbalance that?

A. Raise the shoe.

Q. To what extent does that accomplish the result?

A. It will throw her more into plumb, of course.

Q. It is of assistance in that regard?

A. Yes, sir. [52—20]



(Testimony of Arthur L. Cunningham.)

Q. And where a person has a stiff knee with only ten per cent left and the shortening of an inch in the limb, those two circumstances impair the usefulness of the limb to a very great extent, do they not?

A. Yes, sir.

Q. And those conditions, in your opinion, are permanent and will continue?      A. I am sure of it.

Cross-examination.

Q. (By Mr. MILLER.) Doctor, you say that, due to the shortness of the limb, there may result a certain permanent disability to the spine or injury to the spine; I will ask you if it is not a fact that a shoe could be worn which would overcome that difficulty?

A. Yes, sir.

(Witness continuing.) All the extraneous matter shown in the X-ray photos, such as nails and wire and things, those were things that we used in treating the injury; they were necessities because of the splintering of the bones, which made it necessary to fasten them together.

Q. Doctor, would you say that, at the present time, as the result of the shortening of that limb, there is any injury whatsoever to the spine of the young lady?

A. No, I think not.

Redirect Examination.

To Mr. MOORE.—It is a fact that any person who favors very much one limb over the other and continually rests the major part of his weight on it, or at least habitually does so for periods of time, is liable to rock the hips, and, as a consequence of this,

(Testimony of Arthur L. Cunningham.)

curvature of the spine always results, and those conditions may be very serious in themselves. In the case of the plaintiff, she must, for a short period of time, favor the well limb over the one that sustained injury, because of the weakness of the muscles and the fear that will arise in her mind from an injury [53—21] like this; anybody with a fractured leg, even after the union is complete and strong, will favor it for weeks in a normal case; there is always an aching sensation in the instance of a fracture like this that is felt by the patient, due to blood pressure and due to atmospheric changes; I do not know that I can answer as to the period of time that that may continue; sometimes it is for a few months, sometimes it is for a few years that patients will complain, before storms are coming on or from increased humidity or dampness.

Q. (By the COURT.) It is something in the nature of rheumatic tendencies? A. Yes.

(Witness continuing.) The pelvis does accommodate itself to the shortening of one of the limbs, so that, so far as the mere shortening is concerned, it is not necessarily detrimental to locomotion, but it does it by rotation of the spine, and that rotation depending upon the degree of injury or of no injury to them.

Q. (By Mr. MILLER.) A shortening to the extent that you found in this case, Doctor, would that be almost exclusively overcome by the use of a shoe?

A. Yes, it can.



(Testimony of Arthur L. Cunningham.)

(Witness continuing.) I am one of the appointed surgeons at Fabiola Hospital and have been practising in Oakland for twenty-five years and one month.

**[Testimony of P. H. Eddins, Jr., for Plaintiff.]**

P. H. EDDINS, Jr., was then called as a witness on behalf of the plaintiff and, on being first duly sworn, testified as follows:

My name is P. H. Eddins, Jr., and I reside in Oakland, at the Y. M. C. A.; I am an automobile mechanic and at the present time am in the employ of the Standard Oil Company, and have been in its employ a little over a month; prior to that I was an [54—22] automobile driver, driving a big truck for the National Ice Cream Company, and that was my employment on the 29th day of May, 1914. On that day I was driving along Broadway in the vicinity of its intersection with Twentieth Street, about 5:20 P. M.; when I was about fifty feet from Twentieth Street on Broadway, I noticed a runaway team about twenty feet from the opposite corner, running down Broadway, that is, toward Berkeley. When I first laid eyes on them they were about twenty feet in the direction of Oakland from Twentieth and Broadway; they were coming, I should think, about twelve miles an hour; they were galloping; they were going out towards Berkeley. They made a very big circle to turn this corner; the horse hit his foot on the curb and skidded right into the building; Miss Brainard was found lying right on the curb crushed; I did not see Miss Brainard before this horse struck



(Testimony of P. H. Eddins, Jr.)

her, but just saw her fall; I saw her stumbling and I saw her fall. The horse's foot hit the curb and he kind of skidded, just like an automobile would skid, and his whole body went right toward her and into the wall; he fell on his side and then kind of slid right into her; I got a good view of the team at the time it rounded the corner; I did not notice anybody driving them and I did not notice the lines, whether they were tied to the wagon or not. When the horse struck the curb and skidded, they came in contact with a big post right on the corner of this building (pointing to building on the northwest corner of Twentieth and Broadway shown on "Plaintiff's Exhibit No. 4"); the tongue of the wagon struck the post kind of on the edge. (The witness was here shown "Plaintiff's Exhibit 4," and stated that it was a good representation of the corner where the accident occurred.) The big plate glass on the side of the building was all crushed; it was all broken to pieces; just as the crash came I saw the plaintiff [55—23] struggle and saw her fall just outside of the large plate glass; as the accident happened she made a struggle, then she fell right on the sidewalk; when she first came into my sight she was along the edge of the sidewalk next to the corner of the passageway; just as soon as I reached her I saw blood on the sidewalk and I ran into the garage and met a young fellow there that drives a car, and I told him that there was a young lady that was very badly injured and for him to get her out to the hospital as quickly as possible; he started his machine, pulled it out, and

(Testimony of P. H. Eddins, Jr.)

we stopped right in front of the door, and she was put into the machine by some of the crowd there and we rushed her right to the hospital; that garage was right at the corner of Twentieth and Broadway; I went to the hospital with her.

Here the plaintiff's case was rested, and Mr. Miller, on behalf of the defendant, then stated to the Court the following:

We desire to make a motion for a nonsuit, on the ground that the only thing shown by the testimony is that a team of horses, which had been rented to the defendant, ran away and injured the plaintiff; it is not shown that, at the time of running away and the injury to the plaintiff, they were in the charge or under the control of the defendant or any of its agents, servants or employees; there has not been shown any incompetency on the part of anybody connected with the defendant in any way, shape or form; the sole and only thing that has been shown is, as I stated first, that a team of horses, which had been rented to the defendant in the case, ran away; and secondly that the plaintiff in the action was injured. We contend that there is no showing of any kind or character, even tending to establish the allegation in the complaint of incompetency on the part of anyone connected with the defendant, or tending to show any negligence [56—24] of any kind or character upon the part of the defendant.

The COURT.—The motion is denied.

To which ruling the defendant then and  
Ex. 1. there excepted and the same is hereby designated as Exception No. 1.



(Testimony of P. H. Eddins, Jr.)

The defendant thereupon proceeded with the introduction of testimony in opposition to the complaint of the plaintiff and in support of defendant's answer, and the following testimony was introduced:

**[Testimony of Frank B. Ench, for Defendant.]**

FRANK B. ENCH was then called as a witness on behalf of the defendant and, on being first duly sworn, testified as follows, to wit:

To Mr. MILLER.—I am familiar with the premises occupied by the San Francisco Breweries in Oakland, on the west side of Broadway, between 19th and Twentieth Street, and I made a diagram of said premises according to scale; the diagram that is tacked up to the blackboard is the one I made. The sidewalk in front of the premises is twenty feet wide; the building is 92 feet 8 inches wide, and has two driveways, one toward Nineteenth Street and one about 35 feet from the Twentieth Street end of the building; the door nearest to Nineteenth Street is 10 feet and the other door is 9 feet 10 inches; in the entrance nearest Twentieth Street there are three doors, two of the doors have loading platforms as shown there; the one nearest to the front is 1 foot 8 inches wide, about a foot and a half high and seven feet long; the one back of that is 1 foot 6 inches wide, about seven feet long and about one and a half feet high. At the rear portion is a larger platform 5 feet 2 inches wide and about 12 feet long, and alongside of it is the door leading to the stable. From the place on the diagram I marked "A to B" the building is covered over with a roof to the point I



(Testimony of Frank B. Ench.)

have marked "E"; from the point I have marked "C to D" is [57—25] a long shed that is also covered with a roof the full length of the property; from "A to C" is a driveway with no roof over it, it goes back the full length; the office has a door leading from the sidewalk on Broadway, and a window facing toward the driveway, about the center of the wall on that side of the office, as shown in the diagram, and it has a door leading from the office into the bottling-house, that is the big room back of the office. The platform I first described, where the testimony shows that the horses were when Mr. Thun came after them, is 25 feet 3 inches back from the front edge of the building, and from the front edge of the building to the outside of the sidewalk is 20 feet, making the distance from that platform to the outside of the sidewalk approximately 45 feet and 3 inches. The distance from the front edge of the building back to the stable is 97 feet 41½ inches, and 25 feet deducted from that will show the distance from the platform first described back to the stable. (The diagram described was then introduced in evidence and marked as "Defendant's Exhibit 'A.' "

#### Cross-examination.

To Mr. MILLER.—There are three doors leading from the passageway where the horses were standing at the time they ran away into the portion of the building where the office was located, marked with three light lines on "Defendant's Exhibit A." The heavy lines represent the wall and the light lines represent the doorways; the doorway where the

(Testimony of Frank B. Ench.)

wagon was standing when the horses ran away is about six or seven inches longer than the platform alongside of it. I made this "Defendant's Exhibit A" last Monday. The platform in front of the door where the horses were standing when they ran away is a little over one foot in height; the surface of the platform is a single step from the ground; there is [58—26] no intermediate step there.

Q. (By Mr. MOORE.) Then, if I may be permitted to mark this, there is a doorway that roughly corresponds to these blue lines there? (Marking doorway with blue lines at the platform nearest to the street.) A. Yes, sir.

Q. Where is the nearest doorway; does that correspond or hold the same relation as the other doorways? A. Yes, sir.

Q. And the next one is up here? (pointing to first doorway or opening back of the one above referred to.)

A. Yes, sir; this has no platform.

Q. Can a man go into the doorway situate at either platform 1 or 2, and also pass from there into the office?

A. Yes, sir; he just walks right up there; this is all an open space here. (Pointing to open space back of office.)

**[Testimony of Thomas Walker, for Defendant.]**

THOMAS WALKER was then called as a witness on behalf of the defendant and, on being first duly sworn, testified as follows:

My name is Thomas Walker; I am bookkeeper for



(Testimony of Thomas Walker.)

the John Wieland Brewery Company, the Oakland agency of the John Wieland Brewery; its place of business is on the west side of Broadway, between Nineteenth and Twentieth, in Oakland; I have been in that capacity for about six or seven years on that side of the bay; I was acting in that capacity on the 28th and 29th days of May, 1914, and was there on both of those days. I know Charles Thun, and, in my capacity of bookkeeper of the defendant in this case, I had transactions with him regarding the hiring of a horse on the 28th day of May, 1914, the day prior to the accident to the plaintiff; the day prior to the accident, I got in communication with a man named Banzell, who was a horse-dealer, and I asked him if it was possible for him to rent me a team of horses— [59—27]

The COURT.—That is immaterial; state what transactions you had with Thun.

(Witness continuing.) I rang Thun up and asked him about the team of horses, and he told me that he would let me have them for, I think it was, two and a quarter for the day; I told him I wanted them the next morning; the only conversation that matured at that time with Thun was, he told me the horses were a light team, light weight, he told me the weight would be about 1100, and I said that would do, I said, all right, if that is the case, you bring them up to-morrow. That is all the conversation that occurred between him and myself at that time. I am informed he brought the horses over the next morning; I was not there, and when the team came



(Testimony of Thomas Walker.)

I had no conversation with him at all. I had never hired any horses from Thun before that time; the horses were used all day on the day they were brought there by Thun and driven by a driver of the name of Harry Crow; he was not a regular driver; they were brought back by Crow about half past four; shortly prior to the team being brought back, I had a conversation with Thun over the phone; he asked me if we would use the team the next day, and I told him no, I said, Thun, you call at half past five and the team is yours, we will be there with the team and it is yours at half past five. Crow was hired by the defendant to drive a bottled-beer wagon to which Thun's horses were hitched. After he came back about 4:30 we did not require that wagon or those horses to be driven any further that day, nor did we have any further work at which to put Mr Crow after he returned the horses and wagon; his work for that day was done, but his wages were not drawn until Saturday; if a driver has earned any wages during the week, he comes around on Saturday and gets them. I was in the office at the time the horses ran away; the moment [60—28] they started I could not see them; I have a window in the side of my office which showed me the horses going out of the driveway, and I could observe them from my front window in the office. On the street I saw them running, I saw them from the time they were on the sidewalk from my front office window; I saw them from that time until they proceeded about a hundred feet on the side of the

(Testimony of Thomas Walker.)

street, then they passed out of my view. Then I went out of the office. The window at the side of my office is the one shown on "Defendant's Exhibit 'A,'" on the left side of the same place marked "Office." The window in front of the office is the one shown on the Broadway side of the diagram.

Q. (By Mr. MILLER.) Were you at any time in a position where you could see, and did you see, whether or not the wheels of the wagon were dragging?

A. The wheels of the wagon were skidding.

Q. They were skidding?

A. They were skidding, and then they would turn slightly and skid again, as far as I could see them.

Q. When you say "skidding," you mean not rolling, or what do you mean?

The COURT.—Skidding is sliding sideways.

A. I don't mean that, your Honor; I mean they were just sliding forward and not turning; they were turning a little and then not turning.

Cross-examination.

To Mr. MOORE.—Mr. Thun never rented any horse to that agency where I was employed, not to my knowledge; I am there all of the time and I had all the hiring; I have no recollection of at any time previous ever having any business with Mr. Thun; that is, as far as my recollection goes. [61—29]

Q. Do you state positively that he did not hire a horse to your agency during a portion of the year before this?

A. When I say positively, Mr. Moore, I mean this



(Testimony of Thomas Walker.)

way, that I generally do the hiring, and I do not—

The COURT.—Do not reason it out; just state whether you can swear positively that he had not done so.

A. I cannot swear positively.

(Witness continuing.) Drivers are paid \$25.00 a week on a ten-hour day basis, from 7 A. M. to 5 P. M. Mr. Thun rang me up before half past four and prior to the time when Crow came in with Thun's horses, and I told him if he, Thun, would come around at half past five his team would be ready for him; that would be half an hour after the team's work was done; I told him that because I did not want him to wait for his horses when he came here; I know the time that the drivers get back from their different routes; I can figure out pretty well by my length of service there just about what time a man will be back there; I figured it out so that when Thun would come up there that the team would be ready for him.

The COURT.—That left an hour between half past four and half past five.

A. But, your Honor, I did not know that he was coming back at half past four.

Q. I thought you said you knew the route?

A. I figured it at about five o'clock, and, so as to give him time to get cleaned up and everything would be ready, I gave him half an hour.

(Witness continuing.) I figured everything would be ready for him by 5:30. I figured that the wagon would weigh about 1000 lbs.; it carried 80 cases of



(Testimony of Thomas Walker.)

beer, in each of which there [62—30] were 24 pints or 12 quarts; the wagon had a pipe framework to hold these cases; I do not think the wagon would weigh more than 1200 lbs. When I saw the team on the street they were going at a very good rate of speed, I should say eight or nine miles per hour; they were going as fast as a man could run, I presume. One of our men took after them, Mr. McKinnon, who was in the office talking to me. When the team got on the street they passed in front of the front window to my office. Mr. McKinnon instantly rushed for the door and pulled it open; the team had taken an angle across the street. Mr. McKinnon rushed up there; but the team was just a little ahead of him and it was going faster than he could run; I do not recollect whether I saw Crow on the sidewalk; I know his ankle was hurt; I did not see him fall to the sidewalk.

To Mr. RIX.—Mr. Crow was not a regular employee; he was employed for a day or two or for two or three days; at this time he was employed two or three days.

To the COURT.—I think at that time, your Honor, I had employed Crow for three or four days, but am not sure.

(Witness continuing.) On this occasion I think he was employed for three or four days; he was employed on the following day and afterwards until we did not require his services any more.

Q. (By Mr. MOORE.) Is it not a fact that you paid Mr. Crow off the next morning and he never

(Testimony of Thomas Walker.)

took a team out of your barn after Friday, May 29th, 1914?

A. I do not think so, I do not think that is a fact.

(Witness continuing.) He worked for me after May 29th, I feel positive of that.

**[Testimony of Alexander McKinnon, for Defendant.]**

ALEXANDER McKINNON was then called as a witness on behalf of the defendant and, upon being first duly sworn, testified [63—31] as follows:

My name is Alexander P. McKinnon; I am employed with the Wieland Brewery as a stable-man and driving part of the time, at Nineteenth and Broadway, Oakland.

The COURT.—The last witness and this witness have spoken of being employed by Wieland Brewery; the defendant is the San Francisco Breweries, Limited; how is that?

Mr. MILLER.—The San Francisco Breweries, Limited, is the defendant, and it owns a number of these different breweries, and among them the Wieland Brewing Company.

The COURT.—The defendant is an English company?

Mr. RIX.—Yes, your Honor, and the Wieland Brewery is one of the breweries taken over by it.

(Witness continuing.) It will be two years next month that I have been in the employ of the defendant at its place of business in Oakland on Broadway between Nineteenth and Twentieth Streets; I was in



(Testimony of Alexander McKinnon.)

its employ on the 29th day of May, 1914, and in the morning, about seven o'clock, was at its place of business; I left there about eight o'clock and got back there about four o'clock and was there until about seven o'clock. On the morning of May 29th, 1914, I saw Charles Thun, he brought a team of horses up there; they were hitched up to one of the brewer's wagons on the Alameda route; the horses were hitched up to the wagon in the shed there; Mr. Thun drove the team up in front of the wagon, the pole was put in and there were two or three of us round there, three of us, Mr. Crow, Mr. Cooper and myself, we all took a hand in hitching up.

Q. (By Mr. MILLER.) What was done by each party there at that time when the team was handed over in the morning?

A. Mr. Thun drove the team up in front of the wagon and [64—32] some one of the boys—it was not myself—put the pole in between the horses and Mr. Thun walked around in front of the team and stood there and helped hook them up.

Q. At the time that these horses were delivered there in the morning by Mr. Thun, state what, if anything, Mr. Thun said to you, or in your presence, in regard to the horses?

A. Well, all that I heard him say was, he drove the team in there, and he said, "Is this the place where they want this team?" And I believe Mr. Cooper says, "Yes, we have been waiting for the team." It was about half-past seven o'clock then; we had been waiting for the team from seven o'clock on, because



(Testimony of Alexander McKinnon.)

I was waiting to get out of the brewery and I could not get out before this team was hooked up and gone before I could get my work started.

Q. At that time was anything said to you, or in your presence, as to the character of the horses?

A. No, sir.

(Witness continuing.) I was on the premises in the afternoon when Mr. Thun came again for the horses; at the time he came up Mr. Cooper and I were doctoring a lame horse's foot in the stable in the front door of the stable; the stable was at the back end of the building and the office was in the front end; I think Thun got around there about five o'clock or some time around there; I did not hear him say anything; he did not talk to me; I never heard him say a word; he did not remain there very long. Walker came out of the office and called me and as I started to go into the office I saw Thun and Mr. Crow sitting on the platform where they load the keg beer; that is the platform like at the entrance of the stable as shown on "Defendant's Exhibit 'A.'" I passed them and went into the office. While Walker and I were talking I heard someone holler "Whoa," and then I [65—33] heard the racket of the horses starting; I ran out the front door and by the time I got out the front door and was half way up they were right across the street, running across Broadway; I crossed the street and the team run right round me; there was a street-car going up toward Twentieth, and the team ran between this car and the sidewalk and I

(Testimony of Alexander McKinnon.)

down the opposite side of the street; they were going too fast for me to catch them. When I got down to the team on Twentieth and Broadway, one of the horses was down; they were on the sidewalk at this time; one of the horses was down and the other was standing up. When I started to unhitch the team one of the lines was tied to a rod around the seat where the check-back is.

Q. (By Mr. MILLER.) State whether or not, at any time, either on the day preceding the date of this accident or in the morning of that day, or the afternoon of that day, Mr. Thun stated to you, or in your presence, anything whatever regarding the character of those horses or either of them?

A. No; that morning when we had the team hooked up, one of the horses had a halter on, and Mr. Crow says to Mr. Thun, "What is this, a colt? Is he mean or anything?" And he says, "No, no, they're all right; he is just a little foolish about the head."

To the COURT.—I never noticed Mr. Crow at the time when I ran out after the team; I did not notice whether he was on the wagon when it passed the window.

#### Cross-examination.

To Mr. MOORE.—The team went through the door and they swung towards Twentieth Street past the office and I ran over across the street and I got right near the team, right near these horses, and it was slippery around there, and they just moved that way to the right a little bit and then swung around



(Testimony of Alexander McKinnon.)

to me. If I had caught [66—34] the horse I would have gone right under it. The horses were just going off from the sidewalk and onto the street when I first got outside the door of the office; the wagon was just going on to the street and the team was about half way between the car-track and the curb, as near as I can tell; I ran out into the street; I ran across the street, very near across it; I went clear across the tracks; I got very close to the horse that was on my side, close enough to grab it; the wagon passed me, and that is a slippery street and I was making a get-away to keep out of the way so as not to get hit with the wagon myself; the wheels of the wagon passed very close to me, maybe two or three feet away; it is a pretty heavy wagon, I should say it weighs a ton and a half; I have never seen the wagon weighed, but it is what is called a two-ton wagon; the team were not what you would call a light team; the horse that was killed, I should judge, would weigh along in the neighborhood of 1200 lbs.; the wagon was not one of those big, heavy wagons that they haul beer barrels with; it is a bottle-beer wagon, a case wagon. I did not notice the wheels at all and could not say whether they were locked; I could not say whether the horses could have dragged the wagon away as rapidly as they did if the wheels had been blocked or locked. I could probably have noticed if the wheels were skidding; I could not say for certain whether they were or not, because I don't remember noticing the wagon; when the wagon got out into the street, it went at a pretty lively rate;



(Testimony of Alexander McKinnon.)

they gained on me as they ran down the street. I am a stable-man, with the exception of the Redwood Canyon and Lafayette work. I am the only one there who can drive four horses. The duties of the stable-man are to feed and water and clean the horses and harness them; no one assists [67—35] me, with the exception of the keg driver, and he harnesses his own team; the drivers hook the horses up; the horses are generally turned over to the drivers right there in the driveway where this other team was hooked up, where this team was standing, and then the driver hooks them up to the wagon. The drivers appear about seven o'clock in the morning and take [68—35½] the teams and hook them up; I have the teams harnessed and ready for them; they generally get back to the stable about five o'clock, and when they get back they unhitch their team and turn them into the stable and take the harness off; that is a part of their duty. My hours are from six A. M. until seven P. M. I was off on the wagon on the day of the accident and got there a little earlier; Mr. Cooper was in charge of the stable that day; I would have been home by six o'clock if it had not been for this trouble with this team; I stayed there after the trouble with the team until things were straightened up. The reason I had to wait for Mr. Thun to come with his team on the morning of May 29th was that I had not loaded my wagon and I had to load it and I could not get in there with a four-horse wagon to load until this

(Testimony of Alexander McKinnon.)

wagon was out of the way. Mr. Crow had been working there before that day, but that morning he came there to work on account of my going to Lafayette and was an extra man; he did not work there the previous day, according to my recollection he did not work there for about three weeks before; on this occasion he was there several days, but I could not say just how many; during the time he was there he hooked his own team and unhooked it, just the same as the other drivers; I am sure he worked there after the accident; he has worked there two or three times for one day since the accident; when they needed an extra man they called on him; he was not there the day after the accident; I could not say how long after the accident it was that he was not employed, but it was not several months. I know there was a halter on one of those horses; Mr. Thun did not say anything to Crow about keeping it on, but there was some conversation between Thun and Crow about that halter; it is not a fact that Thun mentioned the halter to Crow, and he did not say to Crow that the horse should be tied; the [69—36] bridle was over the halter; it is not at all a usual thing to leave a halter on a horse with a bridle on it, unless there is something wrong with the horse; there was no rope to that halter at all; it was on the horse that was killed; when horses are left there there is not any custom about tying them or hitching them up, except setting the brake and checking them back; it is the custom always that the driver when he stops his team sets the brakes; you set these brakes



(Testimony of Alexander McKinnon.)

by a ratchet proposition, you shove the brake on and shove it into a saw-tooth like arrangement, and it holds there; the reins are customarily hooked up on the seat and they pull the team back and check them back so that the horses are loose on the tugs; they are hitched back by a check-back rein on the line; on all of our own horses we have a loop on the line that is buckled right on to the line with a ring in it and that is just the right length so you do not have to stop and tie up the line but back the team right up and hook the line on to the hitch-back; that is located at the right length so that the lines themselves keep the horses loose in the traces; if there is not one of these hitch-backs, we tie the reins into the hitch-back hook there. When I went to unhitch the team from the wagon after the accident, I found one line tied around the seats; there is a rod runs around the back of the seat; that is the same rod they hook to if there is this arrangement on. The other line was dragging. On the day of this accident, Mr. Cooper was acting as stable-man and I drove four horses over the hills into Contra Costa County; Cooper worked in the stable for a week; he had a lame foot; he worked in the stable for a week and I worked as extra man for the following week.

Q. (By Mr. MOORE.) Who were the drivers who went out with the teams on the day following this accident? [70—37]

A. Mr. Reardon, Mr. Goodell, Mr. Gablesen, and, as I come to remember it now, Mr. Crow drove this same team the next day. [71—37½]



(Testimony of Alexander McKinnon.)

The COURT.—Which same team?

A. The same wagon that the runaway was on; I stated before that that he did not work the next day, but, as I come to remember it, he did work the next day.

(Witness continuing.) I believe he continued to work for a week, during the week that Cooper was in the stable.

Q. (By Mr. MOORE.) Your recollection is that he continued to work there until Thursday of the following week?

A. Until Thursday of the following week.

Q. Is your recollection at all clear on that?

A. It is quite clear; I know that he worked there several days when Cooper was in the stable.

Q. Have you talked with anybody here during the intermission about your testimony?

A. About my testimony?

Q. Yes; about what you knew about the case and whether Mr. Crow continued to work there or not?

A. Only among ourselves.

Q. Who do you mean by "ourselves"?

A. Mr. Crow, Mr. Cooper and myself.

**[Testimony of H. M. Cooper, for Defendant.]**

H. M. COOPER was then called as a witness on behalf of the defendant and, upon being first duly sworn, testified as follows:

To Mr. RIX.—I now am and, on the 29th day of May, 1914, was employed by the San Francisco Breweries, Limited; I am a driver; at that time I had

(Testimony of H. M. Cooper.)

charge of the stable; on the morning of May 29th, 1914, I saw Mr. Thun; he brought the horses to the stable; he drove the horses in not hitched up to the rig, but he drove the horses in by the line; he came in by the back entrance; that is a different entrance from the one where the horses were fastened when they got away, that is, he came in the entrance nearest to [72—38] Nineteenth Street; it was about 7:25 when he came in in the morning; we showed where the wagon was and he drove them up to the wagon and we put the pole in; he stayed in front of them while we started to hitch them up; the wagon was in the driveway nearest to Twentieth Street; I asked him about the team when he brought them in, if they were all right, because I seen a halter on one of the horses, and I asked him what the halter was on there for, and he said one of the horses was a little bit skittish about the head but that he was all right; I told the driver not to take any chances with him but to put the chain on when he went out for anything; I seen the horse had a bad eye, that is the reason I said about not taking any chances with the horse, to tie them up, to tie the reins back; I am a driver, but I had charge of the stable then; Mr. McKinnon is the regular stableman. When Thun brought in the horses I helped hitch them up; Mr. Thun and Crow helped hitch them up; Thun was most of the time standing at their heads. About half-past four Mr. Crow drove in from his route after his day's work was through; he came in the same way and drove around facing this way, that is,



(Testimony of H. M. Cooper.)

through the entrance nearest to Nineteenth Street, and drove around to the same dock or platform facing Broadway nearest to Twentieth Street, close to the office. There the team was tied up, that is, the reins were tied back and the brake was put on; I went to the office to see when Mr. Thun was coming after the team and they said they had not heard from him yet and it was about 5:30 when they told me that he had telephoned up that he would be up in a few minutes; he came there about half-past five; I saw him when he came in; he came through the back entrance nearest Nineteenth Street and walked right back to the stable opposite to the entrance nearest to Twentieth Street; he stood there for a few minutes watching us [73—39] treating a horse and then sat down on the platform where they load keg beer, that is, the dock right close to the door of the barn; he stayed there maybe five, six or seven minutes with Mr. Crow, and in the meantime I was attending to the horse that was being treated and the team was standing over near the office hitched to the wagon; it was probably six or seven minutes when Mr. Thun said, "I guess I'll unhitch and go home." Mr. Crow said, "Well, to show you I am a good fellow, I'll help you unhitch." Mr. Thun started out and Mr. Crow started to follow him out. So, the next thing I seen, I was still standing holding this horse, and the next thing was when I heard them holler, "Whoa," and I looked around and Mr. Crow was reaching for the line and Mr. Thun was standing on the left-hand side, the side next to the building, next to the bay horse.



(Testimony of H. M. Cooper.)

I saw the team after they were brought back from out on the road; they were tied back, the reins were tied back to the seat and the brake was on; they were tied so that the traces were loose.

Cross-examination.

To Mr. MOORE.—I had been acting as stable-man for about a week altogether; I think I ceased to act as stable-man on the next Monday after the accident; at that time there were four drivers, Mr. Reardon and Mr. Crow were extra drivers; there were two extra drivers beside the regular ones; I think the accident happened on Friday and that Mr. Crow continued to work as an extra driver after the accident until the Monday or Tuesday following; I know he was there three or four days after the accident. He had worked on previous occasions as an extra driver. He knew what the duties of a driver were. When acting as stable-man I took care of the horses, fed them and cleaned them and put the harness on them and then turned them over to the drivers and they took [74—40] them and hooked them into the wagon and at night they unhooked them. I do not know whether I was helping doctoring this horse or not when Crow drove into the barn upon his return on the day of the accident; up to the time of the runaway we might have been doctoring this horse fifteen or twenty minutes, and then we had to fix him up after the runaway because I turned him loose and went to catch this team.

The COURT.—Were you there helping to fix him up all the time?      A. Yes, sir.

(Testimony of H. M. Cooper.)

Q. How did you happen to be in front to see this wagon with the reins tied up on the brake?

A. Because I seen him when he came in.

Q. How far is that place where he stopped them and put the brakes on from where you were?

A. I think it is about fifty feet or sixty feet, about as far from here as to the back end of the room here.

To Mr. MOORE.—When the horse was being treated I was back in the stable door; Mr. McKinnon got back from his Contra Costa trip about four o'clock, and shortly after he got back he commenced doctoring this horse; I do not know whether I was in the stable or in the bottling-room when Crow came back, but I seen the lines tied after he drove in there anyway. When I first noticed the team in motion, Mr. Crow was just stepping up grabbing—reaching for the lines, stepping on to the step of the wagon; it was all done so quick I do not know whether his feet were touching the step or not, but he did have it afterwards, because he got the line and I seen him dragged on to the sidewalk. When he went out on the sidewalk he was on his back dragging.

Q. (By Mr. MOORE.) Now, let me see if we understand it correctly, and if we do not we will correct it. When you had seen the [75—41] wagon before the team started up, the reins were hitched back and tied in the back of the seat to the extent that the traces became loose; is that right?

A. Yes, sir. [76—41½]

Q. So that, if the team should then start up, they would be compelled to pull the weight of the wagon



(Testimony of H. M. Cooper.)

upon their bits; is that correct?      A. Yes, sir.

Q. And, at that time, the brake was locked, was it?

A. Yes, sir, the brake was on.

Q. When you saw them proceeding out of the barn door, or the premises there, Mr. Crow was being dragged along the floor holding fast to one of these reins, was he?

A. I told you at the first jump of the horses, no, he was reaching for the line; the last time, before he got to the edge of the sidewalk he was being dragged.

Q. At the time that the rig passed out of the door the brake was on, was it?      A. It was.

Q. The wheels were locked?

A. The brake was on.

Q. Were the wheels locked?

A. I was not looking at the wheels at that time.

Q. You were back toward the rear of the building, were you not?      A. Yes, sir.

Q. Could you help seeing the wheels?

A. Yes, sir; there are a lot of times you don't see things like that; maybe you can't see them, maybe you don't think about seeing them.

(Witness continuing.) I could not say when the team was going out of the door whether the wheels were dragging or not; I did not notice that, but I noticed that Crow was being dragged; he was dragging right close to the wheels of the wagon as he held fast to his one rein.

Q. (By the COURT.) Did you notice whether the team was pulled around by the rein that he had hold of?



(Testimony of H. M. Cooper.)

A. In a way, yes, they were pulled a little bit; but he [77—42] let loose when he got to the sidewalk.

(Witness continuing.) He had hold of the right-hand side of the wagon, the right-hand rein, and that pulled the team around a little bit.

Q. (By Mr. MOORE.) They took a kind of corkscrew, did they?

A. They did; they started down the street.

The COURT.—Would not the other rein continue to pull them in a circle? A. It did, in a way.

Q. I thought they went down the street?

A. Yes, but they made a big circle.

Q. (By Mr. MOORE.) Here is the doorway, we will say, leading from the station out on to the road; Mr. Crow was being dragged by the right rein, was he? A. Yes, sir.

Q. You could see that? A. Yes, sir.

Q. How could you tell that it was the right-hand rein from your position?

A. Because he was dragging on to that rein.

Q. How do you know which rein it was?

A. He might have had either one; you could see when he was over the horse which one it was.

Q. You were in a position to see that, were you?

A. I was.

Q. And that kind of dragged the team around while he had hold of it?

A. While he had hold of it, yes.

Q. And so, when they went out, how much did they miss the edge of the doorway by on the right-hand side, how much did the wagon clear that by?

(Testimony of H. M. Cooper.)

A. It did not clear it very much.

(Witness continuing.) Mr. Crow did not have any more than room enough to get out of there, he just cleared it by the width of his body between the wheels and the edge of the doorway; at [78—43] that time the team were not exactly headed down Broadway, the other line was pulling, I guess, a little bit the harder; they got swung around on the side where Crow was dragging by his weight; they had been sort of turned by Crow dragging the right line, and that pulled them off not exactly straight across the street; it was a little bit south on Broadway, they were slanting a little down Broadway, that is, in the direction of Fourteenth Street, and when Mr. Crow let go they turned on Broadway, because the other line was pulling them around. I am not a judge as to the weight of horses, but these horses were about the size of those usually driven; they would go 1250 lbs., I think; but I am telling you I am not a judge of the weight of horses; I think the weight of the wagon would be about twelve hundred pounds; it has a steel bed, but it is not solid; I think it would go over a ton. The brake was a ratchet brake that you could set in the teeth causing the wheels to lock; the horses when they run away were going faster than I could run. If they were not ahead of me and I had nothing the matter of either of my feet, they were running faster than I could run. Some drivers have reins buckled at the ends and some have not; there is no rule as to that; these reins were tied back to the seat; there was a rail on the back of the seat



(Testimony of H. M. Cooper.)

and they were tied to that; I observed closely enough to see that. I was in the bottling-shop at the time I saw them tied; we were inside the bottling-shop; after we were working on the horse we were all inside of the shop for, maybe, four or five minutes, Al and I and Harry Cooper we went in there for a little drink.

Q. (By Mr. MOORE.) There is another thing, Mr. Cooper; you said that, observing the bad eye of this horse when it was brought in in the morning, you told Crow to be sure when taking him out to [79—44] put the chain on; what did you have reference to?

A. There is a chain on the front of the wagon that hooks into the front wheel; there is the brake and the chain too.

Q. Was the chain put on, do you know?

A. Out on the road, do you mean?

Q. I mean the team was left here unhitched other than the lines being tied back; that is, they were not tied to a post or anything adjacent?

A. I could not see in there whether the chain was on or not; I had seen the lines tied back and I know the brake was on, I saw the brake was on, I did not notice the chain.

Q. This horse was not tied by a rope from the halter, was it?

A. He was not, he had no rope on the halter at all.

Q. These chains that you speak of reach over the front axle, there is a little chain that hangs from the body of the wagon and that you can hook into the



(Testimony of H. M. Cooper.)

spokes of the wheel, is there not?

A. Yes, sir, it locks the front wheel.

Q. When you went up there to get a little drink, you passed to the left of this wagon, did you not (indicating right and left in the direction in which the wagon was facing)? The left of the wagon?

A. Yes, sir.

Q. Where was it you saw the brake? Was it the block of the brake as it rested against the rim of the wheel? A. The brake was on full.

Q. How did you see that? Did you see it by looking at the staff of the brake or did you see it by looking at the block of the brake?

A. I guess you call it the staff.

Q. Where the man puts his foot? A. Yes, sir.

Q. That was over on the right side of the wagon, wasn't it? [80—45] A. Yes.

Q. Then, how were you able to see that?

A. Because I leaned over the door and looked over the foot-board of the wagon and seen it and looked at the lines.

Q. (By the COURT.) How did you come to do that?

A. Because I looked to see if the lines were tied.

Q. (By Mr. MOORE.) And you could not see the staff of the brake as you walked down there into the bottling-shop unless you leaned over?

A. Not exactly leaned over, no, I didn't exactly have to lean over to see it, because it was not far enough past the doorway of the dock or platform there.

(Testimony of H. M. Cooper.)

Q. There is a kind of structure on one of these wagons, is there not, a kind of framework where the curtains set in? A. Yes.

Q. It is so that you cannot see through, it is a solid construction, is it not? A. Yes.

Q. The staff of the brake does not stand up very high, does it, on one of these wagons?

A. It stands up past the foot-board.

Q. Yes, I know that, but does it come up to the level of the seat, the top of the seat? A. No, sir.

Q. (By the COURT.) It is one of those foot-brakes on the side, is it not?

A. It is on the side of the wagon, it stands up high enough above the foot-board, even if you are on the other side you can see whether it is on full.

Q. (By Mr. MOORE.) You did not go up to the front wheel of the wagon, did you, in going into the bottling-shop, when you went into the bottling-shop did you go up as far as the back wheel of the wagon itself? A. Almost up there. [81—46]

Q. Where was the hind wheel of the wagon standing with respect to the door, ahead of that bottling-works?

A. It was standing not quite past the back of the doorway; I cannot explain it here, I can show it on there though (referring to "Defendant's Exhibit A").

Q. (By Mr. MILLER.) Show it on here?

A. Standing here (pointing to the back end of the platform nearest to Broadway in the driveway), when I looked out of this doorway here (referring



(Testimony of H. M. Cooper.)

to doorway from the platform into the building), the front wheel was a little past that and I would not even have to lean up there to look over there, I could almost see the front of the wagon; the hind wheel was a little bit back here, it was a little past the platform.

Q. (By the COURT.) Why did you suggest then that you did lean over to look at it?

A. Because naturally you would lean against the side; I did not exactly have to lean over to see it, it was just like that, I leaned over like that.

Q. What had made you doubtful as to whether the team was tied or not?

A. I don't know; I just simply looked over there.

Q. Crow was a man who was safe as a driver, wasn't he?

A. Yes, sir; but I don't think there is any place where there are drivers, but one will always take a look at another fellow's team or something like that.

(Witness continuing.) The team may have been standing there five minutes when we went up to take a drink, the lines were tied to the side on the iron; there was a rail to this seat and the lines were tied to the rail; there was no hold-back on these [82—47] lines, Mr. Thun did not have a hold-back on his lines; there was on the back of the seat an iron hook to fasten to when there are rings on the line, but that hook is not big enough to tie the lines to. The hind wheels were back further than this platform No. 1 from the rear edge of the door; this is the way the gangway runs in here; the wheels were just a little



(Testimony of H. M. Cooper.)

bit back of it, they might have reached back a foot or a foot and a half back of the doorway; from the first door to the second door is a distance sufficient to drive a team in, I should say about fourteen or sixteen feet; it was by this rear doorway that I walked into the bottling-room on each occasion.

#### Redirect Examination.

To Mr. RIX.—I know it was the right line that was loose, because I could see on the side of the horse that Mr. Crow was hanging on to, you could tell that was the right line; also I saw when we helped unhitch the horse up at the corner, and the left line was tied back to the seat, to the rod which was on the seat, and the brake was still full on.

#### Recross-examination.

To Mr. MOORE.—We had to release the brakes to pull the wagon away from the horses at the time to get them loose from the wagon; this horse was down; this team was not unhitched when Crow brought it in because we were expecting Thun to come and get it; I have never seen horses hired there before; there were no other occasions prior to this that I know of where we used hired horses. At that time of day you are speaking about, if they unhitched the horses, there was no room in the stable, and there was no place to tie them up.

**[Testimony of Harry Crow, for Defendant.]**

HARRY CROW was then called as a witness on behalf of the defendant and, on being first duly sworn, testified as follows: [83—48]

To Mr. MILLER.—My name is Harry Crow and at the present time I am driving a big automobile truck. On the 29th day of May, [84—48½] 1914, I was in the employ of the San Francisco Breweries as a driver of a bottling-wagon and two horses; I remember the accident that occurred at the premises of the brewery, on the west side of Broadway between Nineteenth and Twentieth Streets about 5:30 o'clock in the afternoon of May 29th, 1914; I was working as a driver for the brewery on that date; I was an extra driver for the brewery and had worked, I think, about a week at that time, and then before that, maybe, a few days at a time when they would call me. I continued in their employ for three or four days, I guess, after the accident; I drove the team that caused the accident; I was present at the brewery on the morning of the 29th day of May, 1914, when the team of horses which I drove on that day were brought there; a man by the name of Thun brought them, I think, about 7:15 or somewhere near that in the morning; these horses were driven into the brewery premises by Thun, on the south driveway; they were harnessed when he brought them; I asked him if the horses were wild in any way, and he said no, they are free drivers, one of them is a free driver; Thun, I think, stayed there while Cooper, McKinnon and myself hitched up the horses, but I



(Testimony of Harry Crow.)

am not sure of that. I got back to the brewery after the day's work about four o'clock in the afternoon; when I got back there there was no further route for me to drive over during the day; I drove into the place where we always unload our empties and unloaded all of the empties and went in to cash in with Mr. Walker; I went out and asked the stable-man, Shall I unhitch them, and he said, "No, they have already telephoned us that the gentleman was coming after his team." I put them at the platform where we always load up at the same place that we drive them in, and left them standing there; that was the platform nearest Broadway. [85—49]

Q. (By Mr. MILLER.) Now, Mr. Crow, here is a diagram of the premises of the Brewery (pointing to "Defendant's Exhibit 'A'"), the lower portion of it is Broadway; the line where my pointer is is what they call the South Drive (pointing to the drive nearest to Nineteenth Street), and the other one (pointing to the one nearest Twentieth Street) is the North Drive; where I am pointing to now (pointing to the North Drive) is the platform nearest Broadway? A. Yes.

Q. Then the one behind it still farther back near the stable, and still farther back of that the stable; now, point out on this map (referring to Defendant's Exhibit "A") where it was that you left the horses and wagon standing? A. Right here.

Q. Now, then, you are pointing to the platform there on the north side of the north drive into the



(Testimony of Harry Crow.)

premises of the defendant and the one nearest Broadway?      A. Yes.

(Witness continuing:) When I stopped the wagon and the horses there I put on the brake and tied the lines up; there were no rings on the lines; when I drove into the brewery I set my brakes and there were no rings on the lines, and there is a rail on the back of the seat; I just tied a loop right there with the lines, like you would tie a bow knot and put the lines through and pulled them through like this (illustrating); the brakes were set, the lines were pulled back about the same as the rings would set them, pretty tight; I was on the premises when Mr. Thun came after his horses; I was sitting on the platform next to the ice-house over where they keep the keg of beer; it is just this side of the stable; the platform I refer to is the one on the diagram ("Defendant's Exhibit 'A'") shown as adjoining the stable; it is designated on the diagram as "Loading Platform"; I was there alone until Mr. Thun came in; he came up and sat down [36—50] on the platform alongside of me; Cooper and McKinnon were working on the horse that had a nail in its foot, they were right at the doorway of the barn or stable; when Thun came up he said something about his team, and Cooper said "They are waiting in the driveway," or something to that effect; Thun and I talked possibly five minutes, and then he said, "All right, I will take my team." I said "All right, I have been driving them all day and I will come and help you unhitch

(Testimony of Harry Crow.)

them.” He then started off ahead of me toward the team and I followed up behind him; he possibly was three paces ahead of me; he went on the left-hand side of the wagon and I went on the right-hand side and he walked from this platform and I went on the right; there is no platform there, just a gangway there, and all at once the horses started to go, and I made a jump on the step and grabbed for the lines and I caught one line, and they dragged me through the doorway; I suppose I went through a space of about two feet there and they dragged me on to the curb and I had to let go, I had only one line; I could not tell where Thun was at that time; he was on the other side of the wagon and I could not tell; just as I got to the step there was something started them; then I made a grab for the lines and jumped on the step to get hold of the line; the brake was still on and the lines were still fast; I got only one line; I hung on to the line to the curb, about fifty feet; the horses were right at the curb, right on Broadway there, when I dropped the lines. The reason I dropped it was I could not hold on any longer; they were turning to the left and they would run over me and I had to let go of the lines; they hurt me as it was.

Q. (By the COURT.) When you tied up those lines, how did you say you tied them? [87—51]

A. There is a rail over the back of the seat, do you know, like this, and I just pulled the lines through and put a knot through that.

Q. You put them through together? A. Yes.



(Testimony of Harry Crow.)

Q. You tied them in a single knot?      A. Yes.

Q. How could you get one line through without untying the other?

A. I could not tell you that; I know I only had one line when they were dragging me.

Q. They must have released the other line?

A. I could not tell you, I never went up to the wreck at all.

Q. You were badly hurt?

A. I got pretty badly hurt on the knee and leg.

Q. You did not go up to the wreck?

A. No, I could hardly walk for a few minutes.

Cross-examination.

To Mr. MOORE.—I think I was working about a week before this accident, and about three or four days afterwards; I did not quit work next day.

Q. (By Mr. MOORE.) I will ask you, Mr. Crow, whether or not you had a conversation with Inspector Hodgkins of the Oakland police force on June 6th, 1914, at some brewery over in Alameda; do you recall that?      A. Yes.

Q. Is not it a fact that you then and there stated to Inspector Hutchins, "I worked as a driver for the Wieland Brewery at 931 Broadway for two weeks, worked in the place of Henry Cooper; I quit Saturday, May 30th"?

A. I did not quit; Mr. Cooper went back to work; he was hurt.

Q. You said here also that Cooper returned to work?      A. Yes. [88—52]



(Testimony of Harry Crow.)

Q. Now, did you not state to Inspector Hodgkins at that time and place, "I quit Saturday, May 30th"?

A. I could not tell you if I did; Cooper was working all the time.

Q. He was not working?

A. In the stable, yes.

Q. His usual job was that of a driver, was it not?

A. It was the same route as I had.

Q. But at that time he was laying off on account of some injury to his leg, was he not, and acting as stable-man?

A. I think he only laid off a few days, and then the stable-man gave way to me and he took the extra job, and Mr. Cooper took the stable.

Q. Do you testify that you did not tell Mr. Hodgkins back on June 6th, just a week after this occurrence, that you quit Saturday, May 30th?

A. That I quit?

Q. Yes.      A. I didn't quit.

The COURT.—He is asking you if you did not tell Mr. Hodgkins as he asks you there, as he put it there, didn't you tell Mr. Hodgkins that you quit on May 30th?

A. I don't think so, because I did not quit.

(Witness continuing:) When the team was brought in there that morning, Cooper told me that, as this is a strange team I had better chain the wagon; I asked Mr. Thun if the horses were all right, and he said that one horse was a little bit

(Testimony of Harry Crow.)

bad about his head or something; he said one of them was a free horse; he referred to the one on the left-hand side, it had a halter on it.

Q. Had you noticed during the day that that horse was unusually free?

A. Yes, up until possibly I had reached Elmhurst; after [89—53] that he was quiet.

Q. Did you ever state that you knew that horse was a free horse and that, in fact, he had several times during the day tried to run away from you?

A. Only in the morning he was; he may not have tried it, but it appeared that way to me; he was a good free horse, he was right on the bit all the time.

Q. Did you tell Mr. Thun that night, when he came in there, that the horse was a good free horse and had been on the bit all day?

A. I could not tell you whether I did or not.

Q. Is not it a fact that you told him they were a good team and had been on the bit all day?

A. I don't remember if I did.

Q. Do you remember his asking you how you got along with the team? A. I do not.

Q. Is not it a fact that you stated to Inspector Hodgkins that the left horse of the team was a bad horse?

A. After he had run away I might have, yes.

Q. Did not you say to him further, he tried several times during the day to run away?

A. In the morning I do not know if he tried to run away, but, as I said before, he was a good free

(Testimony of Harry Crow.)

horse, he would have gone if you had let him go.

Q. Whether he was a good free horse or not, did you make the statement to the inspector on June 6th that he was a bad horse and that he tried several times during the day to run away?

A. I may have made that statement, yes, up till that time in the morning.

(Witness continuing:) I cannot say for sure, I should say the horse was about eight or ten years old; I don't know about [90—54] age; he was a good lively horse; I am not a judge of the age of horses; I am a driver; he was a freer horse than the other horse; when going on my rounds I use the chain because it was a strange team; we were supposed to use a chain any how in town; we never did use the chain in the stable, we just left them in the gangway.

Q. Do you testify that this team started up before you reached up on the wagon at all?

A. Just as we got about the front of the wagon something started them and I made a grab for the lines.

(Witness continuing:) They made a jump right there; I was not on the wagon when the horses started to run away; I was walking up to the step, I just got to the step; there is a step on the front of these bottling-wagons on each side, and I had just got up to the front and I was going to unhitch the traces on this side when the horses started, and of course, I put my foot on the step and made a



(Testimony of Harry Crow.)

grab for the lines on the right-hand side of the wagon; I was going to help unhitch.

Q. Is it customary to unhitch the traces before you unfasten the hitch-back where they are tied back with the reins?

A. I don't know as it is, no.

Q. Don't you know that where horses are hitched that way, if they were horses you were to be careful about, that you would unhitch them on the tug before you unfasten them from the bit?

A. You have to unhitch the tugs first.

Q. Why did you have to unhitch the tugs first?

A. You would not want to take the lines down first.

(Witness continuing:) I had just got up to the front end of the wagon and made a grab for the lines; I could not see Thun at all, he was on the other side of the wagon.

Q. Now, you were a witness, were you not, in Judge Brown's [91—55] Court over in Alameda County? A. Yes.

Q. On Mr. Thun's case? A. Yes.

Q. I want to ask you, on that occasion, whether these questions were asked of you and these answers given by you: "Q. Is it customary for you to unhitch the team before you untie the lines?

A. Not when the man tells you to leave them stay there.

Q. What was your purpose in getting up on the step? A. I merely said I will help you unhitch the horses.

Q. You started to untie the lines at

(Testimony of Harry Crow.)

that time? A. Certainly, I was stepping up. Q.

You were going to untie the lines? A. Yes, sir.

Q. As a teamster you know you should not untie the lines? A. I should say not; what should you

do? Leave the lines where you could not get at them? Q. Then you would unhitch the team by

untying the lines first? A. Certainly; get them where you could get at them." Were those ques-

tions asked of you, Mr. Crow, and those answers made by you on that occasion?

A. I guess they were.

Q. Well, now, what is your testimony in regard to that in the unhitching of a team where they are tied back; should you unhitch the tugs first or unfasten the lines where they are tied in?

A. I should think it would be according to the team; now, usually when we go in the brewery with the horses that we have over there, the lines have all got rings on them and you take the rings on the lines and throw them off and get down and unhitch.

Q. I want to ask you if, on that occasion, at that same trial over there, Judge Brown did not ask you this question: "Q. Don't you, when you leave the horses standing, don't you tie them? A. Not in the brewery." Do you recall his asking you that question and you making that answer? [92—56]

A. It is according to what you mean by tying.

Q. What do you mean?

A. You know there is rings on the lines and there



(Testimony of Harry Crow.)

is a hook on the back part of the seat, and we always pull up the lines and hook the rings over.

Q. Then, when you said you did not tie them in the brewery, you did not mean to be understood as saying that you did not hitch them back?

A. We always hitch them back; you might call that tying.

Q. The way you answered Judge Brown, you had in mind tying them to a post or something of that kind, hitching them to a post?

A. But not in the brewery, we never hitch them in that way; not on the street either.

Q. Don't you call that tying, when you hitch them back?

A. Possibly it is called tying; it is hitching back.

(Witness continuing:) What we call tying and what you call tying may be two different things; we do not tie them by the neck or a rope, we check our lines back. I was working for the Wieland for three or four days after the accident; I think I worked at the Tacoma during the latter part of the next week; I was stopping at my home then; I don't remember making any statement in the presence of Mr. Thun and the other men there.

Q. Don't you remember that they did ask you how it happened, and you stated that, in untying the lines you had dropped one of the lines and it had fallen on the fetlock of one of the horses?

A. No.

Q. Do you say that you did not say at that time



(Testimony of Harry Crow.)

and place that you had dropped one of the lines?

A. I don't think I did state that at all.

Q. Do you say positively, Mr. Crow, that you did not make that [93—57] statement within twenty minutes after the team got away, that you had dropped one of the lines?

A. No, I never made any statement like that.

Q. Is not it a fact that you had both of these lines in your hand before the team ever started up at all?

A. No, I made a grab for the lines and I grabbed one line.

(Witness continuing:) When I pulled at the lines I may have had them both, but when they pulled me through the door I only had one, I could not tell whether I had both in my hand before they started; I know I had one line when they pulled me through the door.

Q. Don't you know whether you had both of these lines and whether you dropped one or not, so that you only had one at the time you got to the door?      A. No.

Q. Do you mean to say that you don't know now whether you had both of those lines to begin with?

A. I may have had both of them, but both of them did not come untied when I pulled at them.

Q. Did not you state in the conversation that you had with Mr. Hodgkins on June 6th, over at the trial in Alameda County: "I went to the right side of the team, I stepped up and got the lines from where they were attached to the seat; just then the team started to run; I don't know what started

(Testimony of Harry Crow.)

them, they dragged me across the sidewalk; I hurt my leg”?

A. Mr. Hodgkins may have misunderstood me on that over there.

Q. Without regard to that, Mr. Crow, the question is, didn't you state to him: "I told him" (referring to Mr. Thun) "I would assist him to unhitch; he went to the left of the left horse, I went to the right side of the team; I stepped up and got the [94—58] lines from where they were attached to the seat; just then the team started to run; I don't know what started them, they dragged me across the sidewalk."

Q. Did you make that statement to him?

A. I could not tell you, as I told you before; it was when the team started to run that I made a grab for the lines.

Q. If you did tell him that, would it have been a fact?

A. No, the horses were started when I made a grab, when I stepped upon the step and made a grab for the lines; Mr. Hodgkins may have misunderstood me on that, on the statement in that respect.

(Witness continuing:) I tied these reins in there at the rim of the seat by means of a loop; I pulled them right around and pulled the loop into it; they were extraordinarily long reins; they were hanging down and I made a grab for them and caught the underneath part; they were long reins; they belonged to Thun; they came with the harness,



(Testimony of Harry Crow.)

they are not the Brewery harness; the part of them I caught must have been the part after the knot; I could not have pulled the line out if I didn't; the lines were two or three feet longer than our lines; the lines that extended back from the horses to the rail were not hanging slack; it was the end of the lines after the knot that was tied; I must have caught one of those ends; I could not tell how the line became untied.

Q. When you were standing on the board, what caused you to fall off of the footboard?

A. When I fell off the step?

Q. Yes.

A. I jumped; the horses were then pretty nearly out of the door; I ran along about two steps before I got on the step.

(Witness continuing:) The horses started to jump; as soon [95—59] as they started I made a grab for them; I do not know whether I jumped up while the wagon was on the go; the horses were, maybe, stamping around and I just made a grab for them; the horses were stamping around, and as soon as they started to go I made a grab for the step, and that is what hurt my leg; they had started and they were stepping around; they threw me off of the footboard; I could not tell you how I was thrown off, I guess I must have jumped; when I seen they were going to try and get away, what I wanted to do was to pull them in the side of the brewery, to jerk the horses and get them into the side of the brewery before they started; I know it



(Testimony of Harry Crow.)

hurt me pretty bad; I could not tell you just what I did in the excitement and everything; the line I had was the one on the grey horse, that would be the right-hand horse, I think it was that line, I could not tell you to be sure which line it was; it was on the grey horse, that would be the off horse, I was going to pull them in to the south side or right-hand side; I was dragged very nearly to the curb; I could not tell you, to be truthful, which line I had, because any line was good to me so I could get them into the brewery one way or the other, I did not care; after they got out of the door they turned north on Broadway; that would be up Broadway; they went straight out of the door; I was trying to stop the team and when they turned up Broadway they pretty near threw me between the two wheels, and I had to let go of them or the wheels would have gone over me; after they got to the curb they turned; I got back to the brewery somewhere about four o'clock and had been around about an hour, I guess, before the team ran away.

Q. (By a JUROR.) Will not your Honor allow me to ask one question? I would like to know as to the reins; there is a buckle that usually hitches the reins together; had you been driving all [96—60] day with these reins loose?

A. There is no buckle on these; they were loose all day, I had been driving with them loose; there is usually a buckle around the rail and then a ring on it that goes into a hook on the back part of the seat.

(Testimony of Harry Crow.)

Q. (By Mr. MOORE.) Why did you wait around there if your work was through? Why did you wait around there from the time you got in with your team about four o'clock until a quarter after or half past five?

A. We usually, when we get in like that, sit around and we will talk to the boys, and I was watching them doctoring this horse that had the nail in its foot; I could have gone home.

(Witness continuing.) I do not think they were doctoring the horse all the time from the time I got there until the team ran away; I could not say just how long I was sitting there watching them, that is, McKinnon and Cooper; I do not think they left the horse while I was sitting there; I did not go any place with them; I was sitting there on the platform; it only takes a second or a minute to put on the stop chains, just to hang them around and hook them up.

Mr. MILLER.—I will now offer in evidence this ordinance of the City of Oakland, it is Section No. 24 of Ordinance 607, New Series, reading as follows: "No horse shall be left untied on any highway in the City of Oakland unless securely hitched by a rope, strap or chain attached to its neck or bridle and to a post or other suitable fastening at the curb, or by a rope, strap or chain attached to its bridle and to a suitable weight of not less than twenty pounds; or, in case of one or two horses being hitched to a wagon fitted with a suitable brake, the horses may be backed, the brake set, and the lines or reins so fastened that [97—61] the wagon cannot be drawn



(Testimony of Harry Crow.)

forward by the horse or horses except by means of the lines or reins."

Mr. MILLER.—That is our case.

The COURT.—You do not claim that a compliance with that ordinance would avoid any possible question about negligence?

Mr. RIX.—Merely, as I understand it, as an indication of doing in the stable as much as you are required to do on the street where there is lots of noise. That is for the jury to consider, as to whether we were negligent in complying with the statute, when we used the same method as is required on the street.

The COURT.—The defendant rests?

Mr. MILLER.—Yes, sir.

**[Testimony of St. Clair Hodgkins, for Plaintiff (in Rebuttal).]**

ST. CLAIR HODGKINS was then called as a witness on behalf of the plaintiff, in rebuttal, and, on being first duly sworn, testified as follows:

I am an Inspector of Police connected with the Police Department in Oakland; I was formerly Chief of Police in Oakland; I had an interview with Harry Crow on the 6th day of June, 1914, on the grounds of the Tacoma Brewery Company across the Estuary on the Alameda side; there were present John S. Duston, Assistant Inspector, Harry Crow, and myself; in answer to questions we asked Mr. Crow he stated that he resided at, I think, 3536 Douglas Street in the Fruitvale district; that he had been employed by the Wieland Brewery Company as a driver for two weeks; that he was driving as a



(Testimony of St. Clair Hodgkins.)

substitute or taking the place of Harry Cooper; that on Friday, May 29th, he had been out on the wagon as a driver during the day and had got back to the Brewery office on Broadway at 4:15 P. M.; that he had turned in the day's receipts and also turned in the team; that the team was standing in the driveway facing east, about thirty feet from the sidewalk; that the [98—62] man who owned the team, it being a hired team from the Washington Stable, had called to get the team; that he, Crow, said to the owner that he would assist him to unhitch the team; that the man from the stable went to the left of the left horse and he, Crow, walked around to the right side of the team; that he, Crow, walked around to the right side of the team and stepped up and got the lines from where they were attached to the seat; that just then the team started; he did not know what started them; they dragged him out of the doorway across the sidewalk; that he hurt his knee and did not follow the team to the scene of the accident; he said that his employment terminated on Saturday, May 30th, the regular driver, Cooper, having returned on that day; that, in substance is the conversation I had with Mr. Crow. Prior to that date, that is, June 6th, I called at the Wieland Brewery in an endeavor to find him but did not find him.

Q. (By Mr. MOORE.) Did Mr. Crow state to you at that time that the team had already started when he made the grab for the lines?

A. He did not.

Q. Did Mr. Crow state to you at that time that he

(Testimony of St. Clair Hodgkins.)

only got one of the lines?      A. He did not.

Cross-examination.

To Mr. MILLER.—This being a street accident, I was detailed on the 4th day of June to investigate in company with Inspector John S. Duston who works with me; with but very few exceptions all hospital cases are investigated by the Oakland Police Department; I had no specific request to see Mr. Crow; I was merely given a detail to investigate the accident and in my judgment considered it necessary to see Mr. Crow who had been mentioned as the driver of the team on the day that the accident occurred; I was detailed to make this investigation by Captain Agnew who was [99—63] Acting Captain of Inspectors in the Oakland Police Department.

**[Testimony of Charles Thun, for Plaintiff (Recalled in Rebuttal).]**

CHARLES THUN was then recalled for the plaintiff, in rebuttal, and testified as follows:

After the accident was over, I went back to the place of the Brewery Company and saw the driver there, and Mr. McKinnon and Mr. Cooper were there; the driver said he dropped one of the lines.

Cross-examination.

To Mr. MILLER.—This was when the wagon was brought back to the brewery; the brewery-man brought the wagon back and I stayed there until they fetched it back; this statement was made right there at the barn; I heard Crow say he dropped one



(Testimony of Charles Thun.)

of the lines; he did not say that to me, that is what he said to the other man; I did not hear him say anything else; they quit talking when I came up.

**[Testimony of Harry M. Cooper, for Defendant (Recalled in Surrebuttal).]**

HARRY M. COOPER was then recalled in surrebuttal by the defendant and testified as follows:

Q. (By Mr. MILLER.) On the day of this accident, after the runaway occurred and the wagon had been brought back to the barn or the stable, did Mr. Crow say, in your presence or hearing, that he had dropped one of the lines on the horse?

A. No, sir.

Cross-examination.

Q. (By Mr. MOORE.) Mr. Cooper, did not I ask you when you were on the witness stand yesterday whether or not there was any discussion or any conversation about how the accident happened on that day and after the accident happened?

A. No, sir.

Q. (By the COURT.) There was not a word said among the people at the stable about the accident at all after it was over?

A. Well, amongst us boys.

Q. That is what he is talking about? [100—64]

A. Well, not exactly, no, because the next morning, not the next morning I did not go out either.

Q. They are not talking about the next morning; they are talking about that day; was not the accident discussed among you at all?      A. No, not that day.

Q. There was no discussion about it at all?



(Testimony of Harry M. Cooper.)

A. The other boys were gone and Mr. McKinnon and I were the only ones that were there after the accident, that is, after the team came back.

Q. Did not Thun come back there?

A. Yes, he took the one horse home; after that Mr. McKinnon and I went out to Eighth Avenue; we did not say anything about it, that is, not much about it going out there.

Q. (By Mr. MOORE.) Was Crow there after the accident and at the time they brought the wagon back to the place, was not Mr. Crow there rubbing his shins?

A. Well, I could not say that he was there rubbing his shins.

Q. Well, then, leave out the rubbing of his shins; he was there, was he not?

A. I did not see him just when we came back, but I seen him afterwards all right sure.

Q. He was still there at the stable?      A. Yes, sir.

**[Testimony of Alexander T. McKinnon, for Defendant (Recalled in Surrebuttal).]**

ALEXANDER T. McKINNON was then recalled for the defendant in surrebuttal and testified as follows:

Q. (By Mr. MILLER.) On the afternoon that this accident happened and after it happened and when the wagon was brought back to the stable, did Mr. Crow state in your presence or hearing that he dropped one of the lines on the horse?      A. No, sir.

Q. Did he state that at any time? [101—65]

A. Not that I ever heard.

(Testimony of Alexander T. McKinnon.)

Cross-examination.

Q. (By Mr. MOORE.) Was there any talk about the accident, any remark made by Crow as to how the accident happened?

A. Not in my hearing; I was busy at other work.

Q. Mr. Crow was still around the place after you got back with the wagon, was he not?

A. The only thing I heard Mr. Crow say was that he did not know whether his leg was broken or not, he had hurt his leg.

Q. When was that?

A. That was after I came back with the wagon.

Q. Who was present at that time?

A. Cooper and Crow and myself and Mr. Walker, I believe.

Q. (By the COURT.) Nobody thought to ask about how the accident occurred, do you say?

A. Well, we had not time, your Honor, at that time.

Q. You were back there at the stable again, were you not, after bringing the wagon and the horse back?      A. Yes, sir.

Q. Was not something said about the accident?

A. Not in regard to how they started or what started them.

Q. Nobody asked anything about that?

A. Not in my hearing.

Here the case was closed and the testimony for the plaintiff and for the defendant having been fully taken, the Court instructed the jury as follows, to wit:



**[Instructions to the Jury.]**

“Gentlemen of the Jury, I will ask your attention for a few minutes while I submit to you the law that must control you in your consideration of the evidence in this case for the purpose of reaching a verdict. That is a duty that is cast upon the Court by the law. The Court gives the jury the principles that [102—66] must govern them and they are bound to follow those principles; the jury alone pass upon the facts and determine for themselves from the evidence what the facts are upon which they will base their verdict. And I may say at this time in that regard, gentlemen, that with that function of the jury the Court neither desires to nor has any right to interfere; the Court you will observe, frequently throughout the trial asks questions of witnesses; that is its proper liberty, because it is as much the duty of the Court to unite in endeavoring to elicit the facts for the consideration of the jury as it is of counsel; where the Court watches the testimony of a witness closely and sees that there is something that has not been asked of him, it is the duty of the Court, in the interest of the administration of justice to make the inquiry himself. The jury are not to get an idea from anything the Court may have asked of a witness, either from the manner or the substance of the question, that the Court is in any wise interested in what the verdict of this jury shall be, because it sits here absolutely impartial and with no desire one way or the other; and if you have gathered any idea from any-



thing that might have been suggested by the Court throughout the trial that there is any inclination in the mind of the judge as to how the case should go, you must dismiss that from your minds entirely and find the facts from your own consideration of the evidence, because it is neither the desire nor the province of the Court to in any wise influence you in that regard.

“The action is one brought by the plaintiff to recover from the defendant damages for personal injuries alleged to have been suffered by her through the negligence and carelessness of the defendant under the complaint, the substance of which has been stated and read to you, and she alleges, that is, she, in her complaint, [103—67] places the amount of her damages that she has suffered at the sum of \$25,000.

“The answer of the defendant denies the allegations of the complaint in their entire and essential scope so far as they involve the question of negligence; it alleges that whatever injuries plaintiff received were not by or through any carelessness or negligence on the part of the defendant.

“To entitle a plaintiff to recover in a case of this character it is incumbent upon the plaintiff not only to show that she has been injured,—and as to that in this case there is no question, because that is not in controversy, it is conceded that she was injured, and very seriously injured, but where they rely upon the injury as having occurred through the negligence of the defendant and seek to recover upon that ground, then, of course, it becomes necessary for a

plaintiff to show that her injuries did result from such negligence, or of course she cannot recover from the defendant for those injuries. It becomes material, therefore, to inquire what is negligence.

“Negligence is the omission to do something which an ordinarily prudent person under like circumstances would have done or the doing of something which such a person would not have done in the same situation. It is not absolute or intrinsic, that is, not always the same, but always relates to the circumstances of time, place and persons concerned. Negligence as applied to a party in a case like this means the failure to exercise ordinary care. There are some cases which involve the necessity of extreme care. This, under the law, is a case which involves the requirement of ordinary care. Ordinary care is that degree of care which would be observed under like circumstances by an ordinarily prudent person. Bearing this in mind, if you find that [104—68] the team in question was, at the time of the accident, under the control of the defendant, that is, had not been turned over to Thun, the owner, the defendant was bound to exercise ordinary care to prevent it from running away and injuring others upon the street or elsewhere where they had a right to be; and you will understand that the team was under the control of the defendant if it was under the control of one of its servants or agents while acting within the scope of his employment. The omission, if any, to use such care, would constitute negligence.

“A pedestrian has a right to be on the public



street if he exercises due care to avoid injury, and no question is made of the plaintiff's right to be where she was at the time of the accident, nor as to her due precaution to avoid receiving injury.

“If you believe from the evidence, therefore, that the defendant had control of the team of horses, and that while in such control left the team unfastened and unattended upon its premises, and with the gate or door leading to the street open, and that because of being so left unsecured or unattended the team escaped from the premises and ran away upon the street and as a result the plaintiff was injured, then that is a *prima facie* case of negligence upon the part of the defendant.

“Of course, if you find that the defendant was not at the time in control of the team, but that the team had been delivered to the owner, it would not be responsible for its escape, and cannot be held liable for the injury.

“If you find from the evidence that plaintiff was injured as alleged in the complaint through the negligence of the defendant, then it will be your duty to find a verdict in favor of the plaintiff for such damages, not exceeding the sum demanded, as will compensate her for all the injury and suffering proximately caused to her thereby. In estimating such damages, you may [105—69] consider the extent, nature and character of the wounds, hurts, bruises and broken bones, or other injuries she may have received, the extent to which, if at all, the injuries she received are permanent in their character, as well as the physical and mental worry which she



has endured or may suffer in the future because of her injury; the loss, if any, which plaintiff has suffered or will hereafter suffer by reason of abatement of her ability to follow her work or engage in employment as the direct or proximate result of the injuries received. In determining the mental suffering, if any, it is permissible for you to consider the grief, anxiety, worry, mortification and humiliation which plaintiff has and will naturally suffer by reason of her physical injuries, and the resulting impairment of her physical being and energies.

“The law prescribes no exact measure by which such damages can be estimated, but leaves it to the sound discretion of the jury to fix the amount thereof, in such sum as under all the circumstances may by it be deemed just and proper. Nor does the law require that the plaintiff present any direct evidence to show the amount of general damages which she has suffered—and when I use the term “general damages,” I mean damages which she has suffered by reason of the injury and pain which she has been compelled to go through—or the amount of money which would compensate her for the injuries which she has received. All that is necessary for her to show to the jury is the extent of the injuries received and suffering endured, and it is then for the jury to determine, in the manner I have indicated, the amount of damages which ought to be awarded. Included in your award should be the amount of any special damage suffered by the plaintiff in the way of hospital or doctor’s bills for services rendered [106—

70] by reason of the injuries. Special damages must be expressly proven. You will understand that the burden of proof is upon the plaintiff, and to entitle her to recover she must establish her case by a preponderance of the evidence, that is, by evidence that is to some extent in the judgment of the jury of greater weight and more satisfactory and convincing to your minds than is the evidence opposed thereto.

“Now, gentlemen, those are the specific principles that apply to this character of action. There are certain general principles that it is proper for the Court to state to the jury which obtain in any civil action of like character, and they relate to the manner and method of disposing of the issues by the jury.

“As you have observed, this case has practically resolved itself largely into a question of responsibility for this accident; that the accident occurred, there is no question; that the plaintiff was injured, there is no question. The controversy which divides the contending parties is the question as to upon whom rests the responsibility for that accident. That is the main proposition that you are required to solve. There is a further one, which is advanced by the defendant, and that is the question whether, assuming the occurrence of the accident and the injury to the plaintiff, was anyone at fault; in other words, did not the defendant, if you find it to have been in control of the team at the time in question, do all that was required of it to conform to the standard of ordinary care for the protection of the public against the escape of this team. Now, of course, adverting to the last proposition first, if you find that



all that should have been done was done, that is, if you find that the team was still in the possession and under the control of the defendant, [107—71] and that all was done by it which men of ordinary prudence would have felt necessary under all the circumstances to have done, considering the nature of the team—because the question of negligence is always relative to the circumstances, as I have told you,—considering, as I say, the nature of the team, what they knew of its character, what had been divulged to them by their use of it, if you find that they did—and when I say ‘they,’ I mean those connected with the defendant, because the defendant, being a corporation, can only act through its agencies by way of employees,—if you find they did all that they were called upon to do in conforming to the standard of ordinary care, then, of course, notwithstanding the accident and the resulting injury to the plaintiff, she could not recover, because the law does not visit results of that kind upon one who has done all they are called upon to do. So much for that. The pivotal question, though, as I have said, left for the jury’s consideration, is the question of responsibility for this accident. Around that question has arisen the only substantial conflict in the evidence that has arisen in the case—in whose possession was this team at the time this accident occurred, that is, in whose control, because in a case like this possession and control mean the same thing; here was an instance where the defendant had hired this team for the day; it was brought there and delivered to them to be used upon their own vehicle. It was



hitched to that vehicle, and it still remained hitched to that vehicle when the owner came for it. Now, the controversy arises over the question whether the team was delivered to the owner simply by the declaration that there it was ready for him to take, or whether it was the duty of the defendant, through its agents and servants, to unhitch that team and turn it over to the owner for the purpose [108—72] of taking it to his stable. You have heard the evidence upon that question, gentlemen, you have heard the evidence of all the parties that had anything to do with it; you have seen the appearance of those witnesses upon the stand, and it rests with you to solve the controversy that arises upon that question, because, in accordance with its solution depends your verdict in this case, unless, as I have said, upon the other question you shall find that there was no question of negligence by reason of due care having been exercised.

“The jury are the sole and exclusive judges of the credibility of witnesses. That is something with which the Court has nothing to do. It regulates the testimony that shall be permitted to be elicited from witnesses, but when the testimony is given, the extent to which it shall be believed by the jury is one for them solely. You observe the demeanor of the witness upon the stand, his manner of testifying, the nature of the testimony, whether in view of all the other evidence in the case it strikes you as reasonable as men of intelligence, whether it accords with what ordinary experience would teach you was likely to

have been the case; in other words, whether it is inherently probably or inherently improbable; how far the witness is contradicted by other witnesses; whether he has made inconsistent statements at other times; whether he adheres to a consistent story in his own recital upon the witness-stand, or contradicts himself in some part of his evidence as against what he has stated in others. All these things are considered by the jury in making up their minds as to the degree of credibility which they will accord to the witnesses, and when I say "the witnesses," I mean every witness who has come upon the stand.

"The law raises the presumption and surrounds the witness [109—73] with the presumption that he tells the truth under oath; that presumption, however, does not control the jury and require them to find that all witnesses have told the truth if in applying the tests I have suggested to you you are satisfied that they did not tell the truth. If a witness has testified to a fact or facts which you believe arose merely from a mistake, and not with any intention to deceive, then, of course while it might make you more careful in examining his evidence in other respects, you need not discard it; but if the witness has, in your judgment, deliberately told a falsehood in one fact material to the case, then you are not called upon to believe him at all, and you may discard his evidence in your consideration, unless, of course, you are entirely satisfied from other evidence in the case that in some respects he has told the truth.

"In a case of this kind, gentlemen of the jury,



perhaps it is unnecessary for me to suggest to you that you are to decide this case upon the evidence alone; you are not to permit your minds to be dragged aside by any consideration of sympathy on the one hand or prejudice on the other. The fact that this young woman has been badly injured, and calls for the sympathy of every right-minded man, still it should not sway you toward finding a verdict in her favor unless the legal basis for it is found by you to exist in the evidence, that is, by reason of the defendant's negligence she has suffered this injury; on the other hand, no bias or prejudice against an action of this kind should deter you from doing justice to her if she has suffered this injury through the negligence of the defendant. It has developed, throughout my experience upon the bench, that by reason of the more or less frequency of actions for personal injuries, as these are termed, a prejudice arises in the minds of some men against that class of [110—74] actions. That is not unnatural, because it is undoubtedly the case that a great many are lacking in merit; but no prejudice of that kind should be permitted to weigh with any man upon the jury as against the facts as he may find them disclosed in a particular case before him, where he is satisfied that those facts entitle the plaintiff to recover.

“In the federal courts—unlike the state system—the jury must be unanimous in their verdict; you cannot find a verdict by a less number than by the entire twelve, as you may in the state court.

“I think that that is all I have to suggest to you,



gentlemen, except with reference to your verdict. As I have indicated to you, gentlemen of the jury, should you find a verdict for the plaintiff, then it will be necessary for you to fix the amount. You determine in your minds what general damages she shall be entitled to by reason of her injuries and then add to that anything you find she has shown in the way of special damages, and when I refer to special damages, I think I suggested in the charge that they referred in this case to doctors' bills, hospital bills, and things of that kind. You find what the fact is as to whether she has incurred such obligations, and you add those in with the amount of general damages; you do not put in a separate statement of them, but you just put in the entire amount in a blank which you will find in a form of verdict which is the proper one if you find in favor of the plaintiff. If you find against the plaintiff upon any of the grounds that I have suggested to you, then there is a form here which simply is a finding in favor of the defendant."

**[Exceptions to Instructions Refused and Given.]**

Mr. MILLER.—I desire, in the first place, to except to the refusal of the Court to give the first instruction requested by the [111—75] defendant, that is, as to an instructed verdict, which instruction is as follows, to wit:

"The jury is hereby instructed to render a verdict in favor of the defendant and against the plaintiff."

Ex. 2. Which is hereby designated as Exception No. 2.

Mr. MILLER.—I desire also to take an exception to the instruction of the Court wherein it referred to the fastening or hitching of a horse. I will state that the reason for that is that I am in some doubt as to whether or not the way in which your Honor expressed it will include within it the fastening back of the lines and the setting of the brakes.

Ex. 3. Which is hereby designated as Exception No. 3. The instruction so given by the Court to which said exception is taken is as follows:

“If you believe from the evidence, therefore, that the defendant had control of the team of horses, and that while in such control left the team unfastened and unattended upon its premises, and with the gate or door leading to the street open, and that because of being so left unsecured or unattended the team escaped from the premises and ran away upon the street and as a result the plaintiff was injured, then that is a *prima facie* case of negligence upon the part of the defendant.”

Mr. MILLER.—I also desire to except to the refusal of the Court to give the instruction requested by the defendant with relation to the ordinance in Oakland.

Which instruction was in the words and figures as follows, to wit:

“You are hereby instructed that, at the time of the accident in this action referred to, there was in existence in the City of Oakland an ordinance entitled ‘Ordinance No. 607, [112—76] N. S., regulating traffic and care of vehicles and horses on and over the public highways in the City of Oak-



land, California,' and that in and by Section No. 24 thereof it is provided as follows: 'No horse shall be left unattended in any highway in the City of Oakland unless securely hitched by a rope, strap or chain attached to its neck or bridle and to a post or other suitable fastening at the curb, or by a rope, strap or chain attached to its bridle and to a suitable weight of not less than twenty pounds, or, in case of one or two horses being hitched to a wagon fitted with a suitable brake, the horses may be backed, the brake set, and the lines or reins so fastened that the wagon cannot be drawn forward by the horse or horses except by means of the lines or reins,' and, if you believe from all the evidence in the case that, at the time the horses in this action referred to ran away they were fastened as in and by said ordinance required, then and in such event the defendant cannot be considered as guilty of negligence in the matter of fastening said horses.

#### **Exception No. 4.**

Ex. 4. Which is hereby designated as Exception No. 4. Subsequently the jury returned into court and rendered a verdict in favor of the plaintiff and against the defendant, and assessed the damages in the sum of \$8000.00; and upon this verdict the judgment in this cause in favor of the plaintiff and against the defendant was entered.



Dated this 12th day of June, 1915.

H. B. M. MILLER and  
WM. RIX,  
Attorneys for Defendant.

L. M. HOEFLEER,  
Of Counsel. [113—77]

**[Stipulation as to Bill of Exceptions.]**

IT IS HEREBY STIPULATED that the foregoing is a full, true and correct Bill of Exceptions, and contains all the testimony and proceedings in said cause necessary to be used on the hearing of defendant's Writ of Error in the United States Circuit Court of Appeal.

Dated this 12th day of June, 1915.

HARRISON & HARRISON,  
B. F. STONE, JR.,  
STANLEY MOORE,  
Attorneys for Plaintiff,

L. M. HOEFLEER,  
Of Counsel.

H. B. M. MILLER,  
WM. RIX,  
Attorneys for Defendants.

**[Order Approving, Settling and Allowing Bill of Exceptions.]**

The foregoing Bill of Exceptions, having been duly presented for settlement within the time required by law, the stipulations of the parties, and the orders of this Court, and, having been found to be full, true and correct, is HEREBY APPROVED, SETTLED AND ALLOWED.

Dated this 14th day of June, 1915.

WM. C. VAN FLEET,  
Judge of said Court.

Receipt of a copy of within Defendant's engrossed Bill of Exceptions is hereby admitted, this — day of June, 1915.

HARRISON & HARRISON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Jun. 14, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [114—78]

---

*In the District Court of the United States for the  
the Northern District of California, Second  
Division.*

No. 15,793.

SYLVIA A. BRAINARD,

Plaintiff,

vs.

THE SAN FRANCISCO BREWERIES, LTD., a  
Corporation,

Defendant.

**Petition for Writ of Error.**

The San Francisco Breweries, Ltd., a corporation, the defendant above named, feeling itself aggrieved by the verdict of the jury and the judgment entered thereupon on the 15th day of April, 1915, whereby it was adjudged that plaintiff have and recover from the defendant the sum of \$8,000.00, comes now by H. B. M. Miller and Wm. Rix, its attorneys, and petitions said Court for an order allowing it, said

defendant, to prosecute a Writ of Error to the United States Circuit Court of Appeals in and for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of a supersedeas bond which the defendant shall give and furnish upon said Writ of Error; and that, upon the giving of such bond, all further proceedings in this court be suspended, stayed and superseded until the determination of said Writ of Error by the United States Circuit Court of Appeals in and for said Ninth Circuit.

And your petitioner will ever pray, etc.

H. B. M. MILLER,

WM. RIX,

Attorneys for the San Francisco Breweries, Ltd.

L. M. HOEFLER,

Of Counsel.

[Endorsed]: Filed Jun. 14, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [115—79]

---

*In the District Court of the United States for the Northern District of California, Second Division.*

No. 15,793.

SYLVIA A. BRAINARD,

Plaintiff,

vs.

THE SAN FRANCISCO BREWERIES, LTD., a  
Corporation,

Defendant.



### **Assignment of Errors.**

Comes now the defendant, The San Francisco Breweries, Ltd., a corporation, and files and specifies the following as the errors upon which it will urge its Writ of Errors in the above-entitled action, to wit:

#### **I.**

The Court erred in refusing to grant the defendant's motion for a nonsuit, as appears by Exception No. 1, set forth in the Bill of Exceptions filed herein.

#### **II.**

The Court erred in refusing to direct the jury to bring in a verdict for the defendant in accordance with the instruction requested by said defendant, which is as follows, to wit:

The jury is hereby instructed to render a verdict in favor of the defendant and against the plaintiff.

As appears by Exception No. 2 in the Bill of Exceptions filed herein.

#### **III.**

The Court erred in giving to the jury the following instruction, to wit:

If you believe from the evidence, therefore, that the defendant had control of the team of horses, and that while in such control left the team unfastened and unattended upon its premises, and with the gate or door leading to the street open, and that because of being so left unsecured or unattended the team [116] escaped from the prem-

ises and ran away upon the street and as a result the plaintiff was injured, then that is a prima facie case of negligence upon the part of the defendant.

As appears by Exception No. 3 in the Bill of Exceptions filed herein.

#### IV.

The Court erred in refusing to give to the jury the instruction requested by the defendant as follows, to wit:

You are hereby instructed that, at the time of the accident in this action referred to, there was in existence in the City of Oakland an ordinance entitled "Ordinance No. 607 N. S., regulating traffic and care of vehicles and horses on and over the public highways in the City of Oakland, California," and that in and by Section No. 24 thereof it is provided as follows: "No horse shall be left unattended in any highway in the City of Oakland unless securely hitched by a rope, strap or chain attached to its neck or bridle and to a post or other suitable fastening at the curb, or by a rope, strap or chain attached to its bridle and to a suitable weight of not less than twenty pounds, or, in case of one or two horses being hitched to a wagon fitted with a suitable brake, the horses may be backed, the brake set, and the lines or reins so fastened that the wagon cannot be drawn forward by the horse or horses except by means of the lines or reins," and, if you believe from all the evidence in the case that, at the time the horses in this action referred to ran away they were fastened as in and by said ordi-

nance required, then and in such event the defendant cannot be considered as guilty of negligence in the matter of fastening said horses.

As appears by Exception No. 4 in the Bill of Exceptions filed herein.

V.

The Court erred in entering judgment herein in favor of [117] the plaintiff and against the defendant.

And defendant prays that the judgment of said United States District Court for the Northern District of California Second Division, entered herein in favor of the plaintiff and against the defendant be reversed by reason of, and because of, the errors herein set forth in this Assignment of Errors.

H. B. M. MILLER and  
WM. RIX,

Attorneys for San Francisco Breweries, Ltd.  
L. M. HOEFLEER,  
Of Counsel.

[Endorsed]: Filed Jun. 14, 1915. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [118]

---

*In the District Court of the United States for the  
Northern District of California, Second Division.*

No. 15,793.

SYLVIA A. BRAINARD,

Plaintiff,

vs.

THE SAN FRANCISCO BREWERIES, LTD., a  
Corporation,

Defendant.



**Order Allowing Writ of Error, etc.**

Upon motion of H. B. M. Miller and Wm. Rix, attorneys for the defendant in the above-entitled action, and upon the filing of the Petition for Writ of Error and Assignment of Errors,

IT IS ORDERED that a Writ of Error, as prayed for in said Petition, be allowed, and that the amount of the supersedeas bond to be given by defendant upon said Writ of Error be, and the same is hereby, fixed at the sum of \$10,000.00 and that, upon the giving of said bond, all further proceedings in this Court be suspended, stayed and superseded pending the determination of said Writ of Error by the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated this 14th day of June, 1915.

WM. C. VAN FLEET,  
Judge.

[Endorsed]: Filed Jun. 14, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [119]

---

**[Bond on Writ of Error.]**

KNOW ALL MEN BY THESE PRESENTS, That, we The San Francisco Breweries, Limited, a corporation, as principal, and NATIONAL SURETY COMPANY, as surety, are held and firmly bound unto Sylvia A. Brainard, the plaintiff in the action hereinafter referred to in the full and just sum of Ten Thousand (10,000) Dollars, to be paid to the said plaintiff, her heirs, executors, ad-

ministrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 18th day of June, in the year of our Lord One Thousand Nine Hundred and Fifteen.

WHEREAS, lately at a District Court of the United States for the Northern District of California in a suit depending in said court, between Sylvia A. Brainard, as plaintiff, and The San Francisco Breweries, Limited, a corporation, as defendant a Judgment was rendered against the said defendant, corporation and the said defendant, corporation having obtained from said court a Writ of Error to reverse the Judgment in the aforesaid suit, and a citation directed to the said Sylvia A. Brainard citing and admonishing her to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said The San Francisco Breweries Limited, a corporation, shall prosecute to effect, and answer all damages and costs if it fail to make its plea good, then the above

134      *The San Francisco Breweries, Ltd.,*

obligation to be void; [120] else to remain in full force and virtue.

THE SAN FRANCISCO BREWERIES, LTD.,

By THOS. ALTON. [Seal]

[Seal National Surety Co.]

NATIONAL SURETY COMPANY.

FRANK L. GILBERT, [Seal]

Res. Vice-president.

E. MAHONEY, [Seal]

Res. Asst. Secretary.

Acknowledged before me the day and year first above written.

I. MacBRIDE.

Form of bond and sufficiency of sureties approved June 18, 1915.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Jun. 18, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [121]

---

**[Certificate of Clerk U. S. District Court to Transcript of Record.]**

*In the District Court of the United States, in and for the Northern District of California, Second Division.*

No. 15,793.

SYLVIA A. BRAINARD,

Plaintiff,

vs.

THE SAN FRANCISCO BREWERIES, LIMITED,  
a Corporation,

Defendant.



I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing one hundred and twenty-one (121) pages, numbered from 1 to 121, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$71.10; that said amount was paid by the defendant; and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of said District Court, this 6th day of July, A. D., 1915.

[Seal]

WALTER B. MALING,

Clerk of United States District Court, in and for the Northern District of California.

[Ten Cent Internal Revenue Stamp. Canceled June 6, 1915. W. B. M.] [122]

---

**Writ of Error (Original).]**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, To the Honorable, the Judges of the District Court of the United States for the Northern District of California, Greeting:

Because, in the record and proceedings, as also

in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between The San Francisco Breweries, Limited, a Corporation, Plaintiff in Error, and Sylvia A. Brainard, Defendant in Error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD D. WHITE,  
Chief Justice of the United States, the 18th day of

June, in the year of our Lord One Thousand Nine Hundred and Fifteen.

[Seal]                      WALTER B. MALING,  
Clerk of the United States District Court, Northern  
District of California.

By J. A. Schaertzer,  
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,

Judge U. S. Dist. Ct. Nor. Dist. Cal.

Receipt of copy of within writ of error admitted  
this 18th day of June, 1915.

BYRON F. STONE,

Per A. G. ANDERSON, Jr.,

Attys. for Deft. in Error.

The answer of the Judges of the District Court  
of the United States, in and for the Northern Dis-  
trict of California.

The record and all proceedings of the plaint  
whereof mention is within made, with all things  
touching the same, we certify under the seal of our  
said Court, to the United States Circuit Court of  
Appeals for the Ninth Circuit, within mentioned at  
the day and place within contained, in a certain  
schedule to this writ annexed as within we are  
commanded.

By the Court.

[Seal]                      WALTER B. MALING,  
Clerk.

[Endorsed]:    Original.    No. 15,793.    United  
States District Court, for the Northern District of



California. The San Francisco Breweries, Ltd., Plaintiff in Error, vs. Sylvia A. Brainard, Defendant in Error. Writ of Error. Filed Jun. 18, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [123]

---

**[Citation on Writ of Error (Original).]**

UNITED STATES OF AMERICA,—ss.

The President of the United States, To Sylvia A. Brainard, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, wherein The San Francisco Breweries, Limited, a Corporation, is plaintiff in error, and you are defendant in error, to show cause if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. C. VAN FLEET, United States District Judge for the Northern District of California, this 18th day of June, A. D., 1915.

WM. C. VAN FLEET,  
United States District Judge.

Receipt of copy of within citation on writ of error, is hereby admitted this 18th day of June, 1915.

BYRON F. STONE, Jr.,  
Per A. G. ANDERSON,  
Attys. for Deft. in Error.

[Endorsed]: Original. No. 15,793. United States District Court for the Northern District of California, The San Francisco Breweries, Limited, a Cor., Plaintiff in Error, vs. Sylvia A. Brainard, Defendant in Error. Citation on Writ of Error. Filed Jun. 18, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [124]

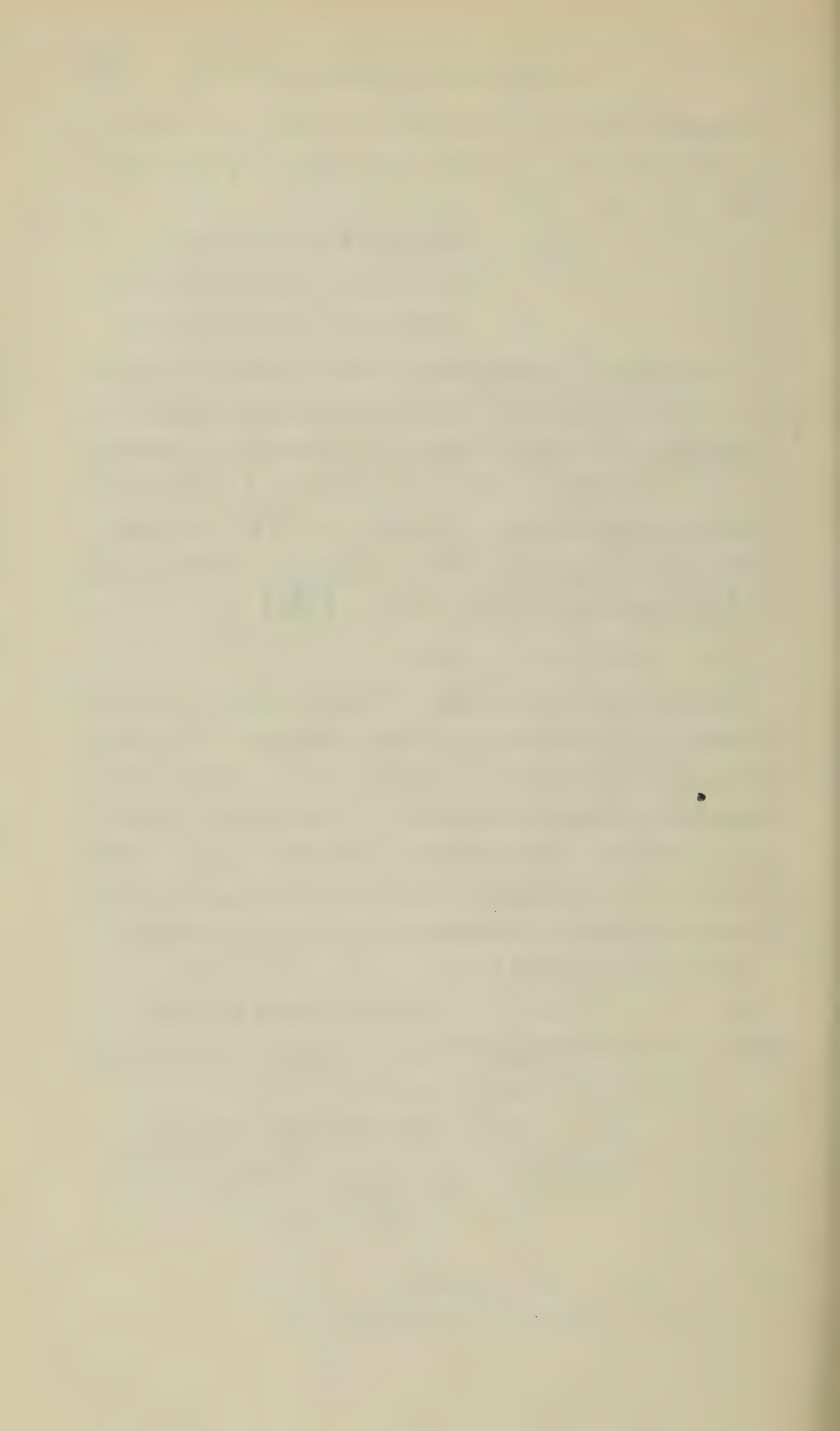
---

[Endorsed]: No. 2620. United States Circuit Court of Appeals for the Ninth Circuit. The San Francisco Breweries, Limited, a Corporation, Plaintiff in Error, vs. Sylvia A. Brainard, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed July 7, 1915.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.





No. 2620

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

THE SAN FRANCISCO BREWERIES,  
LTD. (a corporation),

*Plaintiff in Error,*

VS.

SYLVIA A. BRAINARD,

*Defendant in Error.*

## OPENING BRIEF FOR PLAINTIFF IN ERROR.

H. B. M. MILLER,

WILLIAM RIX,

*Attorneys for Plaintiff in Error.*

L. M. HOEFLEER,

*Of Counsel.*

**Filed**

AUG 7 - 1915

**F. D. Monckton,**

*Filed this.....day of August, 1915,* **Clerk,**

*FRANK D. MONCKTON, Clerk.*

*By.....Deputy Clerk.*



No. 2620

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

THE SAN FRANCISCO BREWERIES,  
LTD. (a corporation),

*Plaintiff in Error,*

VS.

SYLVIA A. BRAINARD,

*Defendant in Error.*

---

## OPENING BRIEF FOR PLAINTIFF IN ERROR.

---

### I.

#### NATURE OF THE CASE.

This is an action brought by the defendant in error, as plaintiff, against the plaintiff in error, as defendant, in the Superior Court of the City and County of San Francisco, State of California, and thereafter, by proper proceedings in that behalf taken, transferred to the District Court of the United States, Northern District of California, Second Division, to recover from the said defendant the sum of \$25,000.00 damages for personal injuries alleged to have been received by her by and



through the carelessness and negligence of said defendant.

The case was tried before the Court sitting with a jury, on the complaint of the plaintiff in said cause and the answer thereto of the defendant, and, after the conclusion of said trial, the jury rendered a verdict in favor of the plaintiff and against the defendant for the sum of \$8000.00, in accordance with which, judgment was made and entered in said cause in favor of the plaintiff therein and against the defendant, on the 15th day of April, 1915, for the sum of \$8000.00, together with \$52.80 costs.

Thereafter, and upon due, proper and legal proceedings in that behalf had and taken, the defendant in said cause prosecuted a writ of error to this Court for the purpose of having said judgment vacated, set aside and reversed, basing its prayer for that relief upon the grounds:

1. That the evidence introduced on the part of the plaintiff at the trial of said cause, and in support of the allegations of her complaint, was and is insufficient to justify the verdict aforesaid, and that the Court erred in refusing to grant defendant's motion for a nonsuit, as appears by Exception No. 1 in the Transcript of record on file herein, greatly to the injury and damage of said defendant.

2. That the evidence introduced on the part of both plaintiff and defendant at the trial of said cause, was and is insufficient to justify the verdict

aforesaid, and that the Court erred in refusing to instruct the jury at the conclusion of said trial, as requested by the defendant, to render a verdict in favor of the defendant and against the plaintiff in said cause, as appears by Exception No. 2 in the Transcript of record on file herein, greatly to the injury and damage of the rights of said defendant.

3. That the Court erred in giving to the jury the certain instruction excepted to by the defendant, as appears by Exception No. 3 in the Transcript of record on file herein, greatly to the injury and damage of the rights of said defendant.

4. That the Court erred in refusing to give to the jury the certain instruction requested by the defendant, as appears by Exception No. 4 in the Transcript of record on file herein, greatly to the injury and damage of the rights of said defendant.

5. That the Court erred in causing judgment to be entered in said cause on the verdict of the jury rendered therein, greatly to the injury and damage of the rights of said defendant.

All as shown by the five different Assignments of Error set forth and contained in the Assignment of Errors appearing on pages 129 and 130 of the Transcript of record on file herein, and by the Bill of Exceptions incorporated in said record on pages 33 to 138, inclusive, of said record.

## II.

## ASSIGNMENTS OF ERROR.

## As to Assignment of Error No. 1.

This is directed to the refusal of the Court to grant the defendant's motion for a nonsuit. After the testimony on the part of the plaintiff, and in support of her complaint, had been all introduced, the defendant then made a motion for a nonsuit in the words and figures following, to wit:

“We desire to make a motion for a nonsuit, on the ground that the only thing shown by the testimony is that a team of horses, which had been rented to the defendant, ran away and injured the plaintiff. It is not shown that, at the time of running away and the injury to the plaintiff, said horses were in the charge or under the control of the defendant or any of its agents, servants or employees. There has not been shown any incompetency on the part of anybody connected with the defendant, in any way, shape or form. The sole and only thing that has been shown is, as I stated first, that a team of horses, which had been rented to the defendant in the case, ran away; and, secondly, that the plaintiff in the action was injured. We contend that there is no showing of any kind or character even tending to establish the allegation in the complaint of incompetency on the part of anyone connected with the defendant, or tend-



ing to show any negligence of any kind or character upon the part of the defendant.”

Which motion the Court denied. To the ruling of the Court in so doing defendant excepted, and the same is designated as Exception No. 1.

(Page 61 of the Transcript of record.)

**As to Assignment of Error No. 2.**

This is directed to the refusal of the Court to instruct the jury at the conclusion of the trial to return a verdict in favor of the defendant and against the plaintiff. To such ruling the defendant excepted, and the same is designated as Exception No. 2.

(See page 122 of Transcript of Record.)

**As to Assignment of Error No. 3.**

This is directed to an instruction given to the jury by the Court over the objection of the defendant as follows:

“If you believe from the evidence, therefore, that the defendant had control of the team of horses, and that, while in such control, left the team unfastened and unattended upon its premises, and with the gate or door leading to the street open, and that, because of being so left unsecured or unattended, the team escaped from the premises and ran away upon the street, and as a result the plaintiff was injured, then that is a prima facie case of negligence upon the part of the defendant.”

To the giving of which the defendant excepted, and the same is designated as Exception No. 3.

(See page 124 of Transcript of record.)

**As to Assignment of Error No. 4.**

This is directed to the refusal of the Court to give to the jury an instruction requested by the defendant in the words and figures following, to wit:

“You are hereby instructed that, at the time of the accident in this action referred to, there was in existence in the City of Oakland an ordinance entitled ‘Ordinance No. 607, N. S., Regulating Traffic and Care of Vehicles and Horses on and over the Public Highways in the City of Oakland, California’, and that in and by Section No. 24 thereof it is provided as follows: ‘No horse shall be left unattended in any highway in the City of Oakland unless securely hitched by a rope, strap or chain attached to its neck or bridle and to a post or other suitable fastening at the curb, or by a rope, strap or chain attached to its bridle and to a suitable weight of not less than twenty pounds; or, in case of one or two horses being hitched to a wagon fitted with a suitable brake, the horses may be backed, the brake set, and the lines or reins so fastened that the wagon cannot be drawn forward by the horse or horses, except by means of the lines or reins.’ And, if you believe from all the evidence in the case that, at the time the horses in this action referred to ran away, they were fastened as in and by said ordinance required, then and in such event the defendant cannot be considered as guilty of negligence in the matter of fastening said horses.”

To which refusal defendant excepted, and the same is designated as Exception No. 4.

(See page 125 of Transcript of record.)

**As to Assignment of Error No. 5.**

This is directed to the action of the Court in authorizing judgment to be entered on the verdict rendered by the jury, and, in view of all the facts and the law hereinbefore set forth and stated, the plaintiff in error respectfully submits that the judgment should be reversed therefor.

---

**III.****ARGUMENT AND AUTHORITIES.****As to the First Assignment of Error.**

Refusal of Court to grant defendant's motion for a nonsuit (see page 61 of Transcript).

In support of the contention of the plaintiff in error that this ruling of the Court was erroneous, we would respectfully call the attention of your Honors to the only testimony offered on the part of the plaintiff in support of her allegation that her injuries were caused by and through the carelessness and negligence of the defendant, and to the fact that there is not one word in that testimony that even tends to show any carelessness or negligence or incompetency of any kind or character on the part of the defendant or of any of its agents, servants or employees.

Mr. Thun was called as a witness on behalf of the plaintiff and, on direct examination, testified as follows:



“My name is Charles Thun; and on the 29th day of May, 1914, I run a kind of service stable at 207 Washington Street, close to Second, in the City of Oakland, and on that day I rented a team to the Wieland Brewery Company. I remember that day; the day before that they called me up and asked me if I had a team I could rent. I told them I had one, that it was a free team and I did not like to let everybody have it. They said they would take good care of it. By free team I mean a free team in travelling. I suppose it was the manager that called me up; I do not know his name; I know him when I see him; I took the team over there the next morning at seven o'clock and saw the man, I suppose it was, that was taking care of the barn. I told him about it; I do not know his name; he was the man I saw there taking care of the barn. I told him the team had done nothing for a couple of days, to be a little careful with them, because a team that does not do anything for a couple of days are feeling quite full of life and a person cannot trust them any. He said he would look after them, and I left the team there. They told me to telephone them and find out when they wanted the team the next day. I called them up on the phone about half past three, and they told me to come over and get them about half past five, and I went over to get them at that time. I rang up about half past three, as near as I can remember; I got there about half past five, and the team was standing in the yard hooked to the wagon. By the word yard I mean kind of a shed or floor boarded up from the outside. There is a door where they drive in and out there.”

(Bottom of page 33, all of page 34, and top of page 35, Transcript of record.)

There were then introduced in evidence on the part of the plaintiff three pictures of the premises

of the defendant, which were marked respectively Plaintiff's Exhibits 1, 2 and 3, which pictures were admitted to be correct representations of said premises generally, and one picture of the corner of Broadway and Twentieth Street, where the accident happened to plaintiff, marked as Plaintiff's Exhibit 4. And, before proceeding with the examination of Mr. Thun, and for the purpose of enabling the Court to become somewhat familiar with the premises of the defendant, which are referred to in his testimony, we will give a brief explanation of the exhibits referred to.

**Plaintiff's Exhibit No. 1.**

Is a picture taken from directly in front of the premises of the defendant, located on the west side of Broadway, between Nineteenth and Twentieth Streets, and shows the front view of the building in which was located the office of the defendant, and the yard adjoining the same on the Nineteenth Street side thereof, the portion of said exhibit occupying the left one-half of said picture showing the entrance to said yard with the door thereto open, and the portion of said exhibit occupying the right one-half of said picture showing the entrance to the office of said building with the number 1931 on the door thereof. Looking back through the open doorway into the yard will be seen a team of horses standing about in the same position that the horses used by defendant were standing when they ran away, and still back of them will be seen



the open doorway to the stable at the rear end of the premises of defendant.

**Plaintiff's Exhibit No. 2.**

Is a picture taken apparently from a position a short distance to the right, and toward Twentieth Street, of that occupied in the taking of Exhibit No. 1, showing the same entrance to the yard referred to in Exhibit No. 1, at the right of the picture, while to the left of said picture is shown the entrance to said yard nearest Nineteenth Street. In this picture can also be seen through the open doorway to the yard, a wagon standing back in said yard, about in the same position occupied by the wagon of the defendant at the time that the horses in the complaint referred to ran away; and still back of that the same entrance to the stable shown in Exhibit No. 1.

**Plaintiff's Exhibit No. 3.**

Is the same as Exhibit No. 2, except that the picture is apparently taken from a position a short distance to the left, and toward Nineteenth Street, of that occupied in taking Exhibit No. 1.

NOTE.—When Exhibits Nos. 1 and 3 are placed over each other so that the portion of the letter “R” shown on the extreme right of the sign appearing on said Exhibit No. 2 is placed over the first letter “R” shown in the word “Fredericksburg” in the sign over the office in Exhibit No. 1, a full front view of the premises of the defendant will be



obtained, showing the building in which the office was located, the entrance to the yard immediately adjoining said office on the Nineteenth Street side thereof, and the entrance to said yard nearest Nineteenth Street. In each of these pictures the door out of which the horses ran when they ran away is shown as open, and an "X" is marked over the same.

**Plaintiff's Exhibit No. 4.**

Is a photograph of the northwest corner of Twentieth Street and Broadway, in the City of Oakland, and shows the place where the plaintiff was run into and injured by the team of horses, in the complaint referred to, that ran away.

All of which, we understand, are among the records before the Court on this hearing, and to the originals of which we hereby refer.

The examination of said witness was then proceeded with, and he testified as follows:

"When I got there about half past five in the evening, the team was standing there in the yard back a ways from the door in Plaintiff's Exhibit No. 1, over which I have marked an X, about twenty or thirty feet back, I think. While on each of the two pictures shown me, one of the doors is shown as closed, at the time of the accident both doors were open. The horses were headed toward Broadway as they were standing hitched to the wagon.

"Q. By Mr. MOORE. When you got there upon that occasion and saw the team standing there, will you state whether or not, whether

they were tied back or hitched back when you first went in?

“A. I never paid no attention to whether they were or not.

“Q. Did you notice, at the time you first went in there, or before the team started off, whether or not the reins were fastened back to the seat?

“A. Well, I came from in back of the wagon and I never noticed whether they were hitched back to the seat or not.

“Q. What did you do when you came in there about half past five that afternoon, what did you do and where did you go?

“A. Well, when I came in there and they says ‘There’s your team’, he said, ‘Hold on and we will unhitch them for you’, and I started for the office to make a settlement of the day’s work, and he started to unhook them and I started in the doorway and they started off.

(Witness continuing.) “When I said, ‘They said they would unhitch them for me’, I meant one of the attendants. When I brought the horses there in the morning, I did not hitch them to the wagon; I think the driver and the fellow who was taking care of the barn did; I would not say for sure which one it was, any way it was the people who were working for the Brewery; it was the driver who said, ‘We will unhitch them’.

“Q. By Mr. MOORE. You stepped to the office to settle for the time of the team, didn’t you? A. Yes, sir.

“Q. Whereabouts is the office?

“A. It is right close to Broadway, it is right in from Broadway.

“Q. Could you show on one of these pictures here where the location of that office is?

“A. Right here.

"MR. MOORE. For the benefit of the record, the witness calls attention to a small doorway of ordinary size that is shown in the picture and that is marked with the figures 1931, being this doorway right here, gentlemen.

(Witness continuing.) "That is not the doorway I went in; I went in from the back. There is a door into this office off the main floor of the Brewery, and it was by means of that I was approaching the office.

"Q. By MR. MOORE. As you were walking over in the direction of that doorway, what, if anything, did you see the driver do, or where, if anywhere, did you see the driver go?

"A. We both came up to the wagon and I turned in back of the wagon to go into the door and he went on up to the team; that is the last I seen of him until the team started.

"Q. When you were going toward the door, was the driver ahead of you or behind you?

"A. We were walking side by side.

"Q. Will you state whether or not you saw the driver at the front wheel or step of the running board at any time?

"A. No, sir, I could not say that, I did not see it.

"Q. Which side of the wagon were you on at the time the team started?

"A. I had been on the left side; I just stepped on the door-sill when they started.

"Q. And which side of the team was the driver on at that time? A. On the right side.

"Q. By the COURT. On the opposite side from where you were? A. Yes, sir.

"Q. Where was the driver next when the team started; where was he; was he on the floor or where?

"A. He had got out as far as the sidewalk; that was the next place I saw him.

"Q. By MR. MOORE. Where was the team at that time?



"A. The team was out on the street.

"Q. Did you see the team start to go out on the street?

"A. Well, it was done so quick I could not see very much of it until they got just out of the door.

"Q. Now, I want to ask you where the reins were at that time and whether the reins were tied back or whether the reins were dragging at the time they got out into the street and you were able to get a good look at them?

"A. When I got a good look at them the accident happened, it had already happened.

"Q. You saw them, didn't you, when they were out on the street and before the accident happened? A. I seen them running, yes.

"Q. Where were the reins then?

"A. Well, I could not swear to just where they were then, because I was too far behind.

"Q. Don't you remember whether they were on the wagon at that time or were dragging?

"A. No, sir; you see I was behind the wagon and I could not see ahead of the wagon.

(Witness continuing.) "It is pretty hard to tell how fast the team were running; they were running very fast, they were at a full gallop. I ran after them, but could not run as fast as they could. When I saw the team running down Broadway toward Twentieth Street the hind wheels of the wagon were turning around.

"Cross-Examination.

"Q. By Mr. MILLER. How far could you see the wagon at the time you looked and saw the wheels turning? A. About 100 feet.

"Q. And the wagon was directly in front of you and was going away, wasn't it?

"A. Yes.

“Q. So you didn’t have a side view of it at all?

“A. No, I could see the back part of the wagon.

“Q. Do you remember looking particularly and seeing that those wheels were turning?

“A. Well, I seen the whole wagon.

“Q. You saw the wagon going, but did you look particularly and see those wheels turning?

“A. A person does not have to do that.

“Q. I am asking you, did you look and can you say now that you saw those wheels turning?

“A. I did not particularly just look at the wheels, because I was looking at the wagon.

(Witness continuing.) “I first went down to the Breweries place in the morning; the horses were harnessed up, I harnessed them in my barn and drove them down there; I don’t remember whether I went into the entrance next to Twentieth Street or the one nearest Nineteenth Street; when I drove the horses there in the morning, the wagon was standing where they were standing in the evening, it was somewhere around there. When I got there in the evening, the horses were standing at the platform in the yard about twenty or thirty feet back from the street, with their heads facing Broadway or to the front of the building; it was not to Mr. Crow that I delivered the horses in the morning, it was another man; when I delivered them to him I immediately went away. Both Mr. Cooper and Mr. McKinnon were there when I delivered the horses in the morning, but I don’t know which one of them took the horses. When I went after the horses in the evening, these two men and Mr. Crow, the driver, were all there; when I went in I asked them if they were through with the team; I did not ask any particular one; three of them were



there. When someone in the Brewery phoned to me about getting the team, they asked me if I had a team to rent, and I said yes, I have. They wanted to know if it was a good team, and I said yes, it was a lively team; I did not tell them that the team was wild, but I said to be careful with them because they have not been doing anything for three days; I think it was Mr. Walker I talked to over the phone; I did not see him when I took the horses over in the morning; I just started into the office to talk to him when I went after the team at night. When I went around there that night to get the horses, I started for the office from in back of the wagon, I did not go into the office, but went back into the shed; I think I went into the entrance nearest Nineteenth Street, clear back, the back end around by the stable, and when I got there I saw the three men, Cooper, McKinnon and Crow, and one of them, pointing up to the front of the place said, 'There's your team, it is ready for you'. After that I stayed around for a moment watching a horse that was being doctored, and then said, 'I guess I'll have to unhitch and then go home', and then started to walk up to the horses and wagon, and Crow went with me and said, 'I'll unhitch them for you'; and we walked toward the wagon. The hind wheels of the wagon were standing right opposite the door into the building, that is, the back door that goes into the shed, and there was room between that door and the wagon to get inside of the door; when the horses started, I don't know where Mr. Crow was, I did not see him; I did not see him get on the wagon, and I didn't see him loosen any lines that were fastened to the seat of the wagon."

(Pages 35 to 46, inclusive, of the Transcript of record.)



The foregoing is all of the evidence offered by plaintiff in support of the following allegations contained in her complaint, to wit:

“On the 29th day of May, 1914, in the City of Oakland, County of Alameda, State of California, the defendant had under its control and management, and was using in and about the regular course of its business a certain delivery wagon, and a team of two horses by which said delivery wagon was drawn; on said 29th day of May, 1914, the defendant had in its employ a certain unskilful, incompetent and careless servant named Harry Crow, who was employed by the defendant as a driver and who, on said 29th day of May, 1914, in and about the business of the defendant and within the scope of his said employment, was engaged in driving said horses.

“On said 29th day of May, 1914, while said horses and said delivery wagon were under the control and management of the defendant, said Harry Crow so unskillfully, carelessly and negligently conducted himself in and about the driving and management of said horses, which were then and there harnessed to said delivery wagon, that said horses, by reason of the unskillfulness, carelessness and negligence of said Harry Crow, took fright, escaped from his control, and ran away, drawing after them said delivery wagon.”

That testimony, we respectfully submit, not only fails to give any support to the allegations of the complaint which are above quoted, but clearly shows:

1. That, at the time the team in question ran away, it had been delivered to, and was under the management and control of, Thun, the owner there-

of, and was not under the management or control of the defendant or of any of its agents, servants or employees. That Thun himself so considered, is established by his testimony to the effect that, when he went to the place of business of the defendant on the afternoon of May 29th, 1914, to get his team after being phoned to by the defendant that said team would be ready for him about 5:30 o'clock P. M., one of the employees of defendant, pointing toward the team, said to him, "There is your team, it is ready for you."

(See bottom of page 43 of Transcript.)

And that he, Thun, after staying around for a moment or so, then said, "I guess I'll have to unhitch and go home".

(See middle of page 44 of Transcript.)

2. That, whether said team, at the time it ran away, was under the management and control of the defendant or under the management and control of Thun, it did not run away because of any negligence or carelessness or unskillfulness or incompetency of the defendant or of any of its agents, servants or employees, for there is not one word in any evidence offered on the part of the plaintiff showing, or even tending to show, that, by reason of any act or omission upon the part of said defendant, or on the part of any of its agents, servants or employees, said team ran away, the sole and only showing made being that said team ran away while on the premises of the defendant; and that such

fact does not, of itself, constitute any evidence whatever of any carelessness or negligence or unskillfulness or incompetency upon the part of the defendant, or of any of its agents, servants or employees, is clearly shown by the following authorities:

Rowe v. Such, 134 Cal. 573.

In this case it is held:

“In an action by an executrix to recover for the death of the testator caused from being struck by a wagon drawn by a runaway horse, the burden of proof is upon the plaintiff to show negligence of the driver. In the absence of such proof there is no presumption of negligence arising from the fact that the horse ran away; and the burden of proof is not thereby cast upon the owner of the team sued as defendant to explain how or why the runaway occurred; but the defendant is entitled to a nonsuit.”

Coller v. Knox, 71 Atl. 539 (Pa.).

In this case it was held:

“The mere fact of a runaway does not by itself imply negligence, nor would even leaving a team standing in a private lane do so.”

O'Brien v. Miller, 22 Atl. 544 (Conn.).

In this case a nonsuit was granted the defendant by reason of the fact that the only showing made by the plaintiff was that he was injured by a horse that was running away. The Court, in passing upon the question, held that the mere fact that a horse was running away raised no presumption of negligence of the driver and quoted with approval



from the decision in *Button v. Frink*, 51 Conn. 342, as follows:

“If a horse is running away with his driver, there is nothing in that fact which tends to show negligence in the driver or which tends to show how the horse became unmanageable, any more than a house on fire tends to show the origin of the fire, whether accidental or otherwise; and it would seem that it could be as well inferred in such a case that the party in the house was guilty of negligence in causing its destruction in the absence of explanatory evidence showing the contrary, as it can be inferred from the mere fact that, if a horse is running away, the driver is guilty of negligence in causing his running in the absence of proof to the contrary. If such a doctrine should be established as the law, it is not easy to see to what extent it might be carried.”

*Creamer v. McIlvain*, 89 Md. 343.

In this case the Court held:

“The mere fact that horses ran away and an accident occurred will not justify an inference of negligence without some evidence of the circumstances under which it occurred.”

*Garlick v. Dorsey*, 48 Ala. 220.

Here it was held that, to render defendant liable, it was necessary to show that he was negligent in permitting the horse to run away.

*Shawhan v. Clark*, 24 La. Ann. 390.

In this case it was held the owner of a runaway horse is not responsible for the injuries resulting from a collision with another horse and carriage,

no negligence on the part of the owner of the runaway horse being shown.

Cunningham v. Belknap, 60 S. W. 837 (Ky.).

In this case it was held:

“Where plaintiff was run over by a horse and wagon driven by defendant’s servant, and it appeared that the horse was running and could not be controlled by the driver, defendant was not liable in the absence of evidence showing that the conduct of the horse in running was due to any negligence on the part of the driver.”

While it is true that there are decisions in different states that hold at variance with the law laid down in those above referred to, it is also true that such decisions are not in accord with the views of the Supreme Court of the State of California in the case of *Rowe v. Such*, 134 Cal. 573, above cited; and we take it therefore that the decision of the Supreme Court of the State of California, wherein the action at bar arose, will have greater weight with this Court than will the views of courts in other jurisdictions.

It is not alone, however, on the authorities above cited that we rely for a reversal of the judgment in this case, but it is also upon the general proposition of law that

“where mischief is done or injuries inflicted by animals whose generic propensities or habits are neither mischievous nor dangerous, in order to charge the owner for damage done by such animals, it is necessary to allege or prove that such owner knew or had notice that the

animals were accustomed to such or similar mischief; or, to speak technically, the scienter must be alleged and proved. In such a case, actual negligence must be shown."

On this subject, see:

Thompson on Negligence, Vol. I, Sec. 853;  
Shearman and Redfield on Negligence, Secs.  
187 and 188.

Finney v. Curtis, 78 Cal. 498.

In this case it was held:

"The owner of an animal not naturally vicious is not liable for injury done thereby, unless it is affirmatively shown, not only that it was vicious, but that the owner had knowledge of the fact, or that he was so negligently handled by the owner as to cause the injury. When no negligence appears, the mere fact that a horse became unmanageable on the occasion of the injury does not prove that he was vicious or generally unsafe."

Clowdie v. Fresno etc., 118 Cal. 315.

In this case it was held:

"It is well settled in cases such as this that the owner of an animal not naturally vicious is not liable for an injury done by it, unless two propositions are established; one, that the animal in fact was vicious; and, two, that the owner knew it. (Finney v. Curtis, 78 Cal. 498.) Thus, if an animal theretofore of peaceable disposition, while in charge of a master or of a servant, suddenly and unexpectedly, either through fear or rage, inflicts injury, neither is responsible if at the time he was in the exercise of due care."



Haneman v. Western Meat Co., 8 Cal. Ap. 698.

In this case it was held:

“The gist of an action against an owner of an alleged vicious horse, for injuries sustained by a kick therefrom, is the keeping of the vicious horse by the defendant with knowledge of its vicious propensities; and it is of the essence of the plaintiff’s case that he should prove these matters, and also that he himself was ignorant of its viciousness until injury occurred therefrom.”

To the same effect are the following:

Garlick v. Dorsey, 48 Ala. 220;  
 O’Brien v. Miller, 22 Atl. 544 (Conn.);  
 Swanson v. Miller, 130 Ill. Ap. 208;  
 Thornton v. Layle, 111 S. W. 279 (Ky.);  
 Bell v. Leslie, 24 Mo. Ap. 661;  
 Dix v. Somerset, 104 N. E. 433 (Mass.);  
 Benoit v. Troy, 48 N. E. 534 (N. Y.);  
 Hollybarton v. Burke, 26 S. E. 114 (N. C.);  
 Hamilton v. Hopkins, 93 Atl. 615 (Pa.);  
 Massio v. Williams, 167 S. W. 473 (Tenn.).

In view of the facts hereinbefore referred to and the authorities above cited, we respectfully submit that the United States District Court committed error in refusing to grant defendant’s motion for a nonsuit, and that, for such error, the judgment made and entered in this case should be reversed, for, in refusing to grant said motion, it permitted the jury to surmise or conjecture, from the fact alone that said team ran

away while upon the premises of the defendant, that it must have run away because of some negligence or carelessness or unskillfulness or incompetency of the defendant or some one or more of defendant's agents, servants or employees, which inference, in the first place, said jury had no right to draw in the light of the authorities above referred to, and in the second place, should not have been permitted to draw under the decision of the Supreme Court of this State in *Janin v. London & S. F. Bank*, 92 Cal. 14, it being there held that:

“In order to justify the submission of any question of fact to the jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged, and must be such that a rational, well constructed mind can reasonably draw from it the conclusion that the fact exists; and, when the evidence is not sufficient to justify such an inference, the Court may properly refuse to submit the question to the jury.”

See also on this question the case of

*Sullivan v. Morton*, 13 Cal. Ap. 35,  
which holds to the same effect.

It may be contended by the defendant in error, however, that the defendant in this action did have actual knowledge of the propensity of the team in question to run away, because of the fact that Mr. Thun testified that he told the defendant it was a free team in driving and he would not let everybody have it. But, in this connection, we call your Honors' attention to the testimony of Mr. Thun on

this question when he was under cross-examination. On page 42 of the Transcript, you will find the following:

“Q. Did you tell them that it was a team that was wild and was liable to run away?

“A. Not wild.

“Q. I say, did you tell that to the man?

“A. I said to be careful with them, because they had not been doing anything for three days.”

This testimony we do not believe can, by any reasonable construction, be considered as giving notice to the defendant that such horses were wild or were liable to run away, or that there was any danger whatever of their attempting to run away while standing in the yard of the defendant back a distance of some twenty or thirty feet from the street, hitched to a delivery wagon of the defendant, after having been driven all day. That, under the circumstances proved, the information given to the defendant that the horses were a free team in driving was not sufficient to lead defendant to believe, or even to infer, that they were wild or would run away, is clearly shown by the following authorities:

Eastman v. Scott, 64 N. E. 968 (Mass.).

This was an action brought by the plaintiff against the defendant for injuries received by being kicked by a horse owned by the defendant which the defendant was driving. Verdict was directed for the defendant. Appeal was taken therefrom. On the appeal, the Court said:



“We think there was no sufficient evidence that, up to the time of the accident, the horse had a vicious habit of kicking or that the defendant knew or ought to have known that it had such a habit; there is nothing from which to infer that they knew more about the habits of horses than the ordinary man in whose business the use of horses is a mere incident; the animal had been in their possession but a month and a half and had, so far as appears, never given but a single kick, and that in its stable and under circumstances from which to say that the kick was vicious is merely conjecture. \* \* \* Assuming that the fact of the single kick in the stable was known to the defendants, it was not enough to require the submission of the case to the jury, nor can it reasonably be inferred from the conduct of the horse at the time of the accident and on subsequent occasions that it had the vicious habit before the accident, nor that the defendants should be charged with knowledge at that time.”

Benoit v. Troy, 48 N. E. 524 (N. Y.).

In this case it was held that

“In an action to recover damages for an injury done by a pair of runaway horses, proof that they had run away on another occasion ten days before, of which the owner had notice, is not sufficient to invoke the rule as to liability for harboring animals of known vicious propensities, when it is also shown that the horses had been driven for several years on street cars, appearing during that time kind and gentle, and that on both occasions of their running away they were frightened by boys hallooing and throwing snowballs; nor would such evidence justify the submission to a jury of the question whether the owner of the horses was negligent in continuing to use them.”

Haneman v. Western Meat Co., 8 Cal. App. 698.

In this case it was held that,

“Under evidence tending to show a previous kicking by a horse under special circumstances, without injury to anyone, but failing to show the general vicious nature of the horse, and utterly failing to show any knowledge by the owner of any acts of viciousness of the horse prior to plaintiff’s injury, the verdict for the plaintiff is without support.”

We again, therefore, respectfully submit that the United States District Court committed error in refusing to grant the motion of defendant for a nonsuit, greatly to the injury and damage of said defendant, and that because thereof the judgment made and entered in said Court should be reversed.

**As to the Second Assignment of Error.**

Refusal of Court to instruct jury to render a verdict against the plaintiff and in favor of defendant, on all the testimony (see page 123 of Transcript of record).

We have already referred, in discussing Assignment of Error No. 1, to the testimony introduced on the part of the plaintiff, and we now come to that introduced on the part of the defendant, to offset any possible conclusion of negligence on the part of the defendant or any of its agents, servants or employees, that could be drawn from the case made by the plaintiff.

In the first place, Frank B. Ench was called as a witness on the part of the defendant for the purpose of explaining a diagram of the premises of the defendant which had been prepared by him according to a scale, and which was introduced in evidence as Defendant's Exhibit A; and from his testimony it was shown that the premises of the defendant fronted on Broadway, 92 feet 8 inches, and had a depth of 97 feet 4½ inches; that, from Broadway, there were two driveways entering said premises, one about 35 feet southerly from the Twentieth Street side of the building, and extending clear back through the yard to the stable, and one nearer Nineteenth Street; that the place in the driveway nearest to Twentieth Street where the horses and wagon used by defendant were standing when they ran away was inside the yard of defendant and back a distance of about 24 feet 3 inches from the open doorway to said driveway shown on said diagram and on Plaintiff's Exhibits 2 and 3.

(See pages 62, 63 and 64 of Transcript of record.)

Mr. Thomas Walker was then called as a witness on behalf of the defendant and testified in substance as follows:

"I am bookkeeper for the Oakland Agency of the John Wieland Brewery, at its place of business on the west side of Broadway between Nineteenth and Twentieth Streets, and have been acting in that capacity for about six or seven years; I was acting in that capacity on



the 28th and 29th days of May, 1914, and was there on both of those days; I know Charles Thun and, in my capacity of bookkeeper of the defendant in this case, I had transactions with him regarding the hiring of a horse on the 28th day of May, 1914, the day prior to the accident to plaintiff; the day prior to the accident I rang Thun up and asked him about a team of horses, and he told me that he would let me have them for, I think it was, \$2.25 for the day; I told him I wanted them the next morning; the only conversation that matured at that time with Thun was, he told me the horses were a light team, light weight, about 1100 lbs., and I said that would do; I said, 'All right, if that is the case, you bring them up tomorrow'. That is all the conversation that occurred between him and myself at that time; I am informed he brought the horses over the next morning, I was not there, and when the team came I had no conversation with him at all; I had never hired any horses from Thun before that time; the horses were used all day; they were brought there by Thun and driven by a driver by the name of Harry Crow; he was not a regular driver; they were brought back by Crow about half past four; shortly prior to the time he brought the team back I had a conversation with Thun over the phone, he asked me if we would use the team the next day, and I told him no; I said, 'Thun, you call at half past five and the team is yours, we will be through with the team and it is yours at half past five'. Crow was hired by the defendant to drive a bottled beer wagon to which Thun's horses were hitched. After he came back about four thirty, we did not require that wagon or those horses to be driven any further that day, nor did we have any further work at which to put Mr. Crow after he returned the horses and

wagon; his work for that day was done. I was in the office at the time that the horses ran away; the moment they started I could not see them; I have a window in the side of my office which showed me the horses going out of the driveway and I could observe them from my front window in the office; on the street I saw them running, I saw them from the time they were on the sidewalk from my front office window. I saw them from that time until they proceeded about a hundred feet on the side of the street when they passed out of my view. Then I went out of the office; the window at the side of my office is the one shown on Defendant's Exhibit A on the left side of the same place marked 'office'; the window in front of the office is the one shown on the Broadway side of the diagram.

"Q. By Mr. MILLER. Were you at any time in a position where you could see, and did you see, whether or not the wheels of the wagon were dragging?

"A. The wheels of the wagon were skidding.

"Q. They were skidding?

"A. They were skidding, and then they would turn slightly and skid again, as far as I could see them.

"Q. When you say skidding, you mean not rolling, or what do you mean?

"The COURT. Skidding is sliding sideways.

"A. I don't mean that, your Honor, I mean they were just sliding forward and not running; they were turning a little and then not turning.

(Witness continuing.) "Mr. Thun rang me up about half past four and prior to the time that Crow came in with Thun's horses, and I told him that if he, Thun, would come around at half past five, his team would be ready for him; that would be half an hour after the team's work was done; I told him that because



I did not want him to wait for his horses when he came there; I know the time that the drivers get back from their different routes, I can figure out pretty well by my length of service there just about what time a man will be back there; I figured it out that when Thun would come up there the team would be ready for him; I figured that Thun would get back about five and that the team would be ready for Thun about 5:30."

(Pages 64, 65, 66, 67 and 68 of the Transcript.)

Alexander McKinnon was called as a witness on behalf of defendant and testified in substance that, for about two and a half years he had been in the employ of the defendant at its place of business in Oakland, on Broadway, between Nineteenth and Twentieth Streets, as a stableman and driving part of the time; that on the 29th day of May, 1914, in the morning, about seven o'clock, he was at its place of business and saw Charles Thun bring a team of horses there; that this team was hitched up to one of the brewer's wagons in the shed; that Mr. Thun drove the team up in front of the wagon and the horses were there hitched; that, when Mr. Thun drove the team in there, he said:

" 'Is this the place they want this team?', and I believe Mr. Cooper said 'Yes, we have been waiting for the team'. It was about half past seven then, and we had been waiting for the team since about seven o'clock. I was on the premises again in the afternoon when Mr. Thun came for the horses; at the time he came up, Mr. Cooper and I were doctoring a lame horse's foot in the front of the stable at the



back end of the building; I think Thun got around there about 5:30 o'clock; I did not hear him say anything because I was called into the office by Mr. Walker and, as I started to go into the office, I saw Thun and Mr. Crow sitting on the platform where they load the keg beer, that is the platform like at the entrance to the stable as shown on Defendant's Exhibit A; I went on into the office and, while Walker and I were talking, I heard someone holler 'Whoa', and then I heard the racket of the horses starting; I ran out of the front door and, by the time I got out the front door and was half way up, they were right across the street running across Broadway, they were going too fast for me to catch them; when I got down to the team on Twentieth and Broadway one of the horses was down. They were on the sidewalk by this time, one of the horses was down and the other was standing up; when I started to unhitch the team, one of the reins was tied to a rod around the seat where the check-back is."

(Pages 70, 71, 72 and 73 of the Transcript of record.)

On cross-examination, Mr. McKinnon testified in substance as follows:

"When horses are left there, there is not any custom about tying them or hitching them up, except setting the brake and checking them back; it is the custom always that the driver, when he stops his team sets the brake; you set these brakes by a ratchet proposition, you shove the brake on and shove it into a saw-tooth-like arrangement, and it holds there; the reins are customarily hooked up on the seat and they pull in back and check them back so that the horses are loose on the tugs; they are hitched back by a check-back ring on the line; on all of our own

horses we have a loop on the line that is buckled right on to the line with a ring in it and that is just the right length, so you do not have to stop and tie up the line, but back the team right up and hook the line on to the hitch-back that is located at the right length so that the lines themselves keep the horses loose in the traces; if there is not one of these hitch-backs we tie the reins into the hitch-back hook there. When I went to unhitch the team from the wagon after the accident I found one line tied around the seat; there is a rod runs around the back of the seat; that is the same rod they hook to if there is an arrangement on; the other line was dragging.”

(Pages 76 and 77 of the Transcript of record.)

Mr. H. M. Cooper was then called as a witness on behalf of defendant and testified in substance as follows:

“I am, and on the 29th day of May, 1914, was, employed by the San Francisco Breweries, limited; I am a driver; at that time I had charge of the stable; on the morning of May 29th, 1914, I saw Mr. Thun; he brought the horses to the stable; he drove the horses in not hitched up to the rig, but he drove the horses in by the line; he came in by the back entrance; that is a different entrance from the one where the horses were fastened when they got away, that is, he came in by the entrance nearest Nineteenth Street; it was about 7:25 when he came in in the morning; we showed where the wagon was and he drove them up to the wagon and we put in the pole; he stayed in front of them while we started to hitch up; the wagon was in the driveway nearest Twentieth Street; I asked him about the team when he brought them in, if they were all right, because I seen a halter



on one of the horses and I asked him what the halter was on there for. He said one of the horses was a little bit skittish about the head but that he was all right. I told the driver not to take any chances with him but to put the chain on when he went out for anything. When Thun brought in the horses I helped hitch them up; Mr. Thun and Crow helped hitch them up; Mr. Thun was most of the time standing at their heads. About half past four Crow drove in from his route after his day's work was through; he came in the same way and drove around facing this way, that is, he came in from the entrance nearest to Nineteenth Street and drove around to the same dock or platform facing Broadway in the entrance nearest to Twentieth Street close to the office there; the team was tied up, that is, the reins were tied back and the brake was put on. I went into the office to see when Mr. Thun was coming after the team and they told me that he had telephoned that he would be up in a few minutes; he came there about half past five; I saw him when he came in; he came through the back entrance nearest Nineteenth Street and walked right back to the stable opposite to the entrance nearest Twentieth Street; he stayed there for a few minutes watching the treating of a horse, and then sat down on the platform where they load keg beer, that is, the dock right close to the door of the barn; he stayed there maybe five, six or seven minutes with Mr. Crow, and in the meantime I was attending to the horse that was being treated, and the team was standing over near the office hitched to the wagon; it was probably six or seven minutes when Mr. Thun said, 'I guess I'll unhitch and go home'; and Mr. Crow said, 'Well, to show you I am a good fellow, I'll help you unhitch.' Mr. Thun started out and Mr. Crow started to follow him, so the next thing I seen—I was standing holding this horse—and the next thing was



when I heard them holler 'Whoa', and I looked around and Mr. Crow was reaching for the line and Mr. Thun was standing on the left hand side; he stood next to the building, next to the bay horse. I saw the team after they were brought back from out on the road. The team was tied back, the reins were tied back to the seat and the brake was on; they were tied so that the traces were loose."

(Pages 78, 79, 80 and 81 of the Transcript of record.)

On cross-examination, Mr. Cooper testified in substance as follows:

"When I first noticed the team in motion, Mr. Crow was just stepping up grabbing, reaching for the line, stepping on to the step of the wagon; it was all done so quick, I do not know whether his feet were touching the step or not, but he did have it afterwards because he got the line and I seen him dragged on to the sidewalk; when he went out on the sidewalk he was on his back dragging.

"Q. By Mr. MOORE. Now, let me see if we understand it correctly, and if we do not, we will correct it; when you had seen the wagon before the team started up, the reins were hitched back and tied in the back of the seat to the extent that the traces became loose; is that right? A. Yes, sir.

"Q. So that, if the team should then start up, they would be compelled to pull the weight of the wagon upon their bits; is that correct?

"A. Yes, sir.

"Q. And at that time the brake was locked; was it? A. Yes, sir, the brake was on.

"Q. When you saw them proceeding out of the barn door or the premises there, Mr. Crow was being dragged along the floor holding fast to one of these reins; was he?

"A. I told you at the first jump of the horses no, he was reaching for the line; the last time before he got to the edge of the sidewalk he was being dragged.

"Q. At the time that the rig passed out of the door, the brake was on; was it?

"A. It was.

"Q. Were the wheels locked?

"A. I was not looking at the wheels at that time.

"Q. Could you help seeing the wheels?

"A. Yes, sir, there are lots of times you don't see things like that, maybe you cannot see them; maybe you don't think about seeing them.

(Witness continuing.) "I could not say, when the team was going out of the door, whether the wheels were dragging or not; I did not notice that, but I noticed that Crow was being dragged; he was dragged right close to the wheels of the wagon as he held fast to one rein.

"Q. By the COURT. Did you notice whether the team was pulled around by the rein that he had hold of?

"A. In a way, yes, they were pulled a little; but he let loose when he got to the sidewalk.

(Witness continuing.) "He had hold of the right hand side of the wagon, the right hand rein, and that pulled the team around a little bit. Mr. Crow didn't have any more than room enough to get out of there, he just cleared it by the width of his body between the wheels and the edge of the doorway; at that time the team were not exactly headed down Broadway; the other line was pulling, I guess, a little bit harder; they got swung around on the side where Crow was dragging by his weight, they had been sort of turned by Crow dragging the right rein, and that pulled them off not exactly straight across the street; it was a little bit



south on Broadway, they were slanting a little down Broadway, that is, in the direction of Fourteenth Street, and when Mr. Crow let go, they turned on Broadway because the other line was pulling them around.”

(Pages 81, 82, 83, 84 and 85 of the Transcript of record.)

“We had to release the brakes to pull the wagon away from the horses at the time to get them loose from the wagon when the horse was down. The team was not unhitched when Crow brought it in, because we were expecting Thun to come and get it. At that time of day you are speaking about, if they unhitched horses there was no room in the stable and there was no place to tie them up.”

(Page 90 of the Transcript of record.)

Harry Crow was then called as a witness on behalf of defendant and testified in substance as follows:

“My name is Harry Crow, and at the present time I am driving a big automobile truck; on the 29th day of May, 1914, I was in the employ of the San Francisco Breweries as a driver of a bottling wagon and two horses; I remember the accident that occurred at the premises of the Brewery, on the west side of Broadway between Nineteenth and Twentieth Streets, about 5:30 o'clock in the afternoon of May 29th, 1914; I was working as an extra driver for the Brewery then and had worked, I think, about a week at that time, and then before that a few days at a time when they would call me. I continued in their employ for three or four days, I guess, after the accident; I drove the team that caused the accident. I was present at the Brewery on the morning of the 29th of May, 1914, when the team of horses which I drove on



that day were brought there by a man by the name of Thun; they were brought there by him, I think, about 7:15 or somewhere near that in the morning; they were driven into the Brewery premises by Thun, on the south driveway, and were harnessed when he brought them in; I asked him if the horses were wild, and he said, 'No, they are free drivers, one of them is a free driver.' I got back to the Brewery after the day's work about four o'clock in the afternoon; when I got back there there was no further route for me to drive over during the day; I drove into the place where we always unload our empties and unloaded all of the empties and went in to cash in with Mr. Walker. I went out and asked the stableman, 'Shall I unhitch them?' And he said, 'No, they have already telephoned us that the gentleman was coming after his team.' I put them at the platform where we always load up, at the same place that we drive them in, and left them standing there; that was the platform nearest Broadway.

"Q. By Mr. MILLER. Now, Mr. Crow, here is a diagram of the premises of the Brewery (pointing to Defendant's Exhibit A), the lower portion of which is Broadway; the line where my pointer is, is what they call the South Drive (pointing to the drive nearest to Nineteenth Street), and the other one (pointing to the one nearest Twentieth Street) is the North Drive; where I am pointing to now (pointing to the North Drive) is the platform nearest Broadway? A. Yes.

"Q. Then the one behind it, still farther back, near the stable, and still farther back of that the stable; now, point out on this map (referring to Defendant's Exhibit A) where it was you left the horses and wagon standing?

"A. Right here.

"Q. Now, then, you are pointing to the platform there on the north side of the North Drive

into the premises of the defendant and the one nearest Broadway? A. Yes.

(Witness continuing.) "When I stopped the wagon and the horses there, I put on the brake and tied the lines up; there were no rings on the lines; when I drove into the Brewery I set my brakes and there were no rings on the lines; there is a rail on the back of the seat; I just tied a loop right there with the lines like you would tie a bow knot and put the lines through and pulled them through like this (illustrating); the brakes were set, the lines were pulled back about the same as the rings would set them, pretty tight. I was on the premises when Mr. Thun came after his horses; I was sitting on the platform next to the ice-house over where they keep keg beer; it is just this side of the stable; the platform I refer to is the one on the diagram, Defendant's Exhibit A, shown as adjoining the stable; it is designated on the diagram as 'Loading Platform'. I was there alone until Mr. Thun came in; he came up and sat down on the platform alongside of me. Cooper and McKinnon were working on a horse that had a nail in its foot, they were right in the doorway of the barn or stable. When Thun came up he said something about his team and Cooper said, 'They are waiting in the driveway,' or something to that effect. Thun and I talked possibly five minutes, and then he said, 'All right, I'll take my team.' I said, 'All right, I have been driving them all day and I'll come and help you unhitch them.' He started off ahead of me toward the team and I followed up behind him; he possibly was three paces ahead of me; he went on the left-hand side of the wagon and I went on the right-hand side, and he walked from this platform and I went on the right. There is no platform there, just a gangway there; and all at once the horses started to go and I made a jump on the step and grabbed for the lines and I caught one line



and they dragged me through the doorway; I suppose I went through a space of about two feet there and they dragged me on to the curb, and I had to let go; I had only one line; I could not tell where Thun was at that time; he was on the other side of the wagon and I could not tell. Just as I got to the step there was something started them; then I made a grab for the lines and jumped on the step to get hold of the lines; the brake was still on and the lines were still fast; I got only one line and hung on to the line to the curb about fifty feet; the horses were right at the curb, right on Broadway there when I dropped the line; the reason I dropped it was I could not hold on any longer, they were turning to the left and they would run over me and I had to let go of the line; they hurt me as it was."

(Pages 91, 92, 93 and 94 of the Transcript of record.)

#### "Cross-Examination.

"Q. By Mr. MOORE. Do you testify that this team started up before you reached up on the wagon at all?

"A. Just as we got about the front of the wagon something started them and I made a grab for the line.

(Witness continuing.) "They made a jump right there; I was not on the wagon when the horses started to run away; I was walking up to the step, I just got to the step; there is a step on the front of these bottling wagons on each side, and I had just got up to the front and was going to unhitch the traces on this side when the horses started, and of course I put my foot on the step and made a grab for the line on the right-hand side of the wagon; I was going to help unhitch."

(Pages 98 and 99 of the Transcript of record.)



“I tied these reins in there at the rim of the seat by means of a loop, I pulled them right around and pulled the loop into it; they were extraordinary long reins; they were hanging down, and I made a grab for them and caught the underneath part; they were long reins; they belonged to Thun, they came with the harness; they are not the Brewery harness; the part of them I caught must have been the part after the knot; I could not have pulled the line out if I didn't; the lines were two or three feet longer than our lines; the lines that extended back from the horses to the rail were not hanging slack; it was the end of the lines after the knot that was tied; I must have caught one of these ends; I could not tell how the line became untied.”

(Bottom of page 103 and top of page 104 of Transcript of record.)

Defendant then offered, and there was received in evidence as a part of its case ordinance of the City of Oakland, Section No. 24 of Ordinance 607, New Series, reading as follows:

“No horse shall be left untied on any highway in the City of Oakland, unless securely hitched by a rope, strap or chain attached to its neck or bridle and to a post or other suitable fastening at the curb, or by a rope, strap or chain attached to its bridle and to a suitable weight of not less than twenty pounds; or, in case of one or two horses being hitched to a wagon fitted with a suitable brake, the horses may be backed, the brake set, and the lines or reins so fastened that the wagon cannot be drawn forward by the horse or horses, except by means of the lines or reins.”

(Page 106 of the Transcript of record.)

In substance the foregoing is the testimony introduced on the part of the defendant, and we respectfully submit that it clearly shows, First, that, at the time the team in question ran away, they were not in the charge or under the management or control of the defendant or of any of its agents, servants or employees, but had been turned over to the owner, Mr. Thun; Second, that, whether said team was under the control of the defendant or not, it did not run away because of any carelessness or negligence or unskilfulness or incompetency of any kind or character on the part of the defendant or of any of its agents, servants or employees; and, Third, that, as a matter of fact, said team, at the time it ran away, was hitched, fastened or tied, although not standing upon a public street, but in the yard of the defendant a distance of some twenty or thirty feet from the public street, in strict accordance with the method provided by the ordinance aforesaid of the City of Oakland for the hitching, tying and fastening of horses standing upon the public streets of said city.

Notwithstanding these facts, however, the jury rendered a verdict against the defendant and in favor of the plaintiff for the sum of \$8000.00 damages; and, as they could only do so by finding that the accident to the plaintiff occurred by and through the negligence or carelessness of the defendant, they must have found that, although the method of tying, fastening and hitching of said team adopted by the defendant would have been proper



and sufficient had said team been standing upon one of the public streets of the City of Oakland, such tying, fastening or hitching was not proper or sufficient when said team was standing in the yard or shed of the defendant at a distance of some twenty or thirty feet back from the street.

In other words, by the verdict of the jury it is in effect decided that the *greatest* care should have been used by the defendant where the necessity therefor was *least*, and that the *least* care should have been used by it where the necessity therefor was *greatest*.

Such a conclusion, we respectfully submit, is obviously absurd, and yet the Court, by its refusal to give to the jury the instruction requested, plainly left it to said jury to find as it did, thus committing error for which the judgment made and entered in said cause should be reversed. In this view we believe we are supported by the decisions in the cases of

Janin v. London etc., 92 Cal. 14;

Sullivan v. Morton, 13 Cal. Ap. 35,

which are hereinbefore referred to.

#### As to the Third Assignment or Error.

The giving by the Court of instruction as to fastening of team, etc. (see page 124 of Transcript of record).

The objection to this instruction is, First: That it leaves it to the jury to find on the evidence that defendant had control of the team of horses that



ran away at the time they ran away, while, as a matter of fact, for the reasons hereinbefore stated, the testimony clearly shows that it did not have control thereof; and, Second: It leaves it for the jury to say whether or not, at the time said team ran away, they were unfastened or unhitched, while the testimony is, without any contradiction whatever, that said team were fastened in strict accordance with an ordinance of the City of Oakland in that regard.

Under such circumstances, we respectfully submit that said instruction was erroneous, because it permitted the jury to find squarely against the facts proven at the trial, and that for the giving thereof said judgment should be reversed.

Compton etc. v. Dresbach, 78 Cal. 15;

Razzo v. Varni, 81 Cal. 289;

Janin v. London etc., 92 Cal. 14;

In re Calkins, 112 Cal. 306.

In each of which it is held that,—

In order to justify the submission of any question of fact to a jury, the proof must be more than mere conjecture or surmise that the facts are as alleged.

And, by the giving of the instruction here referred to, we respectfully suggest that the jury were permitted to surmise or conjecture that the defendant in this case was guilty of negligence solely and only because of the fact that the team in question ran away while it was standing in defendant's yard.

**As to the Fourth Assignment of Error.**

The refusal of the Court to give instruction as to Oakland ordinance (see pages 124-5 of Transcript of record.)

This instruction, we contend, should have been given to the jury, because it must be clear that, if the horses in question were hitched while in the yard of the defendant in the same manner they were required to be hitched by the ordinance hereinbefore referred to when upon a public street, the defendant surely could not be considered as guilty of any negligence in the manner of hitching. If it could, it would seem peculiar, to say the least, as by so holding the law would require the greatest care to be used where there was the least necessity for it, and the least care to be used where there was the greatest necessity for it. We believe such a contention to be so clearly untenable as to make it unnecessary to cite any authorities in opposition thereto; and we respectfully submit that the instruction refused should have been given, and that, in refusing to give the same, error was committed for which the judgment in this case should be reversed.

**As to the Fifth Assignment of Error.**

We contend that on all the facts as hereinbefore shown, and which were brought out on the trial of this case, and particularly for the reasons set forth and stated in the argument herein as to assignments of error numbers 1 and 2, that it was

error on the part of the Court to permit judgment to be entered in this cause on the verdict rendered by the jury, and that for such error the judgment should be reversed.

In conclusion, therefore, we respectfully submit, that in view of the facts as they are hereinbefore shown, and of the law as applicable thereto, the judgment rendered in this action in favor of the plaintiff in said cause, and against the defendant therein, should be reversed, and that judgment should be ordered to be entered in favor of the plaintiff in error for its costs and disbursements in said action, and on this writ of error.

Dated, San Francisco,  
August 5, 1915.

H. B. M. MILLER,  
WILLIAM RIX,  
*Attorneys for Plaintiff in Error.*

L. M. HOEFLER,  
*Of Counsel.*



No. 2620.

---

---

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

---

THE SAN FRANCISCO BREWERIES, LTD., (a  
Corporation),

*Plaintiff in Error,*

VS.

SYLVIA A. BRAINARD,

*Defendant in Error.*

---

**BRIEF FOR DEFENDANT IN ERROR**

---

HARRISON & HARRISON,

BYRON F. STONE, JR.,

STANLEY MOORE,

Attorneys for Respondent.

---

*Filed this 25th day of October, A. D. 1915.*

FRANK D. MONCKTON, Clerk.

By \_\_\_\_\_, Deputy Clerk.

---

---



No. 2620.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

---

THE SAN FRANCISCO BREWERIES, LTD., (a  
Corporation),

*Plaintiff in Error,*

VS.

SYLVIA A. BRAINARD,

*Defendant in Error.*

---

## BRIEF FOR DEFENDANT IN ERROR

### I.

The five assignments of error relied upon by the plaintiff in error involve substantially only a single question considered from different points of view, namely, whether or not the record discloses any evidence tending to support the verdict. If there was in fact presented by the evidence a question for the jury, as to whether the injury sustained by the plaintiff below, defendant in error in this Court, was or was not attributable to negligence on the part of the plaintiff in error, there can be no doubt that no error was committed by the trial Court in refusing to order a nonsuit, or in giving or refusing to give any of the



instructions referred to in the assignments of error. That there was at least some evidence introduced at the trial to the effect that one or more of the employees of the plaintiff in error had been guilty of negligence which was the proximate cause of the injury sustained by the defendant in error seems to us too clear for argument.

Before taking up in detail the several assignments of error discussed by counsel for plaintiff in error we desire, at the risk of seeming to urge a proposition too elementary to be open to question, to refer to one fundamental rule which must govern the decision of any such case as the one at bar, not as a case involving damage caused by runaway horses, but as a case involving negligence as a question of fact.

Definitions of negligence expressed in almost every conceivable variety of phraseology may be found in the works of text-writers and in the opinions of judges, but all such definitions, however differently worded, have this feature in common that all of them necessarily presuppose some sort of standard of conduct by reference to which the existence or absence of negligence is to be determined. In by far the largest number of situations which arise in actual human experience the law does not attempt to prescribe in any definite, specific, or precise terms any particular standard of conduct. In reference to cases falling within the class referred to, which in fact includes as stated by far the largest number of cases actually occurring, all that the law attempts to prescribe in the way of a standard of conduct is expressed in the

rule that every person, in order to avoid the consequences attaching to an imputation of negligence, must in any given situation conduct himself as a reasonable and prudent person would ordinarily have conducted himself under like circumstances. (*Railroad Company v. Jones*, 95 U. S. 439, 441.) As was stated in *Farrell v. Waterbury Horse R. R. Co.*, 60 Conn. 239, 248-9; 21 Atl. 675, 677; "the law cannot say beforehand how the man of ordinary prudence would act, or ought to act, under all or any probable set of circumstances." There exists a very large class of cases in which the very question to be determined is how a man of ordinary prudence would act under a given set of circumstances, and in which this question must necessarily be submitted to a jury, simply because the question cannot be answered as a question of law. (*McCully v. Clark*, 40 Pa. St. 399.) In every case falling within the class referred to there are always at least two questions to be asked and answered, and generally three such questions, namely, first, what were in fact the circumstances? and then, assuming all dispute as to the circumstances to be eliminated; second, what would have been the conduct of a reasonable and prudent person under such circumstances? and finally, did the conduct of the person under investigation conform to what would have been under such circumstances the conduct of a reasonable and prudent person? Each of these three questions, including especially the question, what would have been the conduct of a reasonable and prudent person under similar circumstances, is essentially

a question within the exclusive province of a jury to determine. (*Davidson S. S. Co. v U. S.*, 205 U. S. 187, 190-191.)

One of the leading cases on this subject is *The Sioux City & Pacific R. R. Co. v. Stout*, 17 Wall. 657. That case turned entirely on the question whether the trial Court had erred in submitting the question of negligence to the jury. It was contended that, since the facts were undisputed, the question of negligence was one of law to be passed upon by the Court, and that the trial Court ought to have ordered a nonsuit. Replying to this contention the Supreme Court said (17 Wall. 657, 661-3):

“Unless the defendant was entitled to an order that the plaintiff be nonsuited, or, as it is expressed in the practice of the United States Courts to an order directing a verdict in its favor, the submission was right. If upon any construction of the evidence which the jury was authorized to put upon the evidence, or by any inferences they were authorized to draw from it, the conclusion of negligence can be justified, the defendant was not entitled to this order, and the judgment cannot be disturbed. To express it affirmatively, if from the evidence given it might justly be inferred by the jury that the defendant . . . had omitted that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow, the jury was at liberty to find for the plaintiff. . . . The evidence was not strong and the negligence is slight, but we are not able to say that there is not evidence sufficient to justify the verdict.”

The Court then referred to different classes of cases, in some of which the inference of negligence from



the facts established is so certain that such inference may be ruled as a matter of law, and in others of which on the contrary the Court is justified in ruling as a matter of law that there is no negligence and no liability. After referring to these extreme cases, the opinion continues as follows (17 Wall. 663-4):

“But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury.

“Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.”

Among the numerous cases in which this fundamental principle has been the basis of decision is one of the cases cited in the opening brief for the plaintiff in error herein, *Garlick v. Dorsey*, 48 Ala. 220. That case turned entirely on the question whether error had been committed by refusing to give at the request of the plaintiff an instruction to the jury that "if they believed from the evidence that the injury . . . was attributable to neglect on the part of the defendant then the plaintiff was entitled to recover."

The evidence was to the effect that the horse which ran away had been for eight years gentle and kind and had never run away before, although frequently left unattended. On the occasion in question the defendant had left the horse unattended for a few minutes, but there was no evidence as to what caused it to run away. There was no evidence of careless or negligent driving by the defendant. The jury returned a verdict for the defendant, but the judgment was reversed on account of the refusal to give the requested instruction quoted above.

## II.

### AS TO THE FIRST ASSIGNMENT OF ERROR.

The contention that the trial Court erred in not ordering a nonsuit involves in reality, as explained by counsel for the plaintiff in error themselves, (pp. 17-19 of their brief,) two subsidiary contentions, first, that there was no evidence that at the time when the team which ran away started to run it was under the

management or control of the defendant or of any of its agents, servants or employees, and second, that, whether or not the first contention be sound, at any rate there was no evidence that the running away was caused by any negligence on the part of the defendant or of any of its agents, servants or employees. We submit that both of these contentions are equally untenable.

(1) As regards the first of these subsidiary contentions, counsel for the plaintiff in error have very little to say. The question for consideration is not whether the team had in fact been delivered to and accepted by its owner, Thun, but whether the evidence before the jury was such that it can be said there was no evidence from which the jury could find that the team had not yet been delivered to Thun. The only evidence referred to as tending to show that such a delivery had taken place is the testimony of Thun that one of the employees of the defendant said to him, the team being then still harnessed to a wagon belonging to the defendant, and standing on the premises of the defendant: "There is your team, it is ready for you." And that Thun after an interval said: "I guess I'll have to unhitch and go home." (Pages 43-4 of Printed Transcript.) Notwithstanding these remarks made to and by Thun the jury was certainly justified in taking into consideration the indisputable fact that at the time of the runaway the team had not yet been unhitched from the wagon, and that therefore the first statement that the team was ready to be delivered to its owner was not true, to say nothing



of the fact that, after the remark made by Thun as quoted above, Crow, the man who during the day had been driving the team, said to Thun: "I'll unhitch them for you," as well as the fact that Thun testified in connection therewith that it was Crow's place to unhitch the horses. (Page 44 of Printed Transcript.)

The utmost that the evidence can legitimately be claimed to prove is that both on the part of the employees of the defendant and on the part of Thun there had been expressed a willingness that Thun should take delivery of the team. That did not, however, amount to a delivery of the team to Thun. There is no principle of law which makes a willingness on the part of two persons, even though entertained by both of them at the same time, or even a deliberate intention shared by both of them, to the effect that a delivery of personal property be made from one of such persons to the other, equivalent to an actual delivery. (*Cochrane v. Moore*, 25 Q. B. D. 57.) In any event it is impossible to say that there was no evidence that the team had not yet been delivered over from the management and control of the defendant to that of Thun.

(2) In support of the second of these subsidiary contentions counsel for the plaintiff in error have cited a number of cases, none of which however bear out their contention in this regard.

In *Shawhan v. Clarke*, 24 La. An. 390, it was properly held as a matter of law that the defendant had not been guilty of negligence. The facts upon which

that ruling was based were that the defendant's horse, immediately before it ran away, was securely tied and under the charge of a stable boy, and that a vehicle drawn by another horse, which was running away, ran into the defendant's horse, while it was so tied and watched, and caused it also to run away. In other words, instead of being a case of an unexplained runaway, or a case in which there was any room for question as to negligence on the part of the defendant, there was an affirmative explanation of the occurrence which exonerated the defendant.

In *Coller v. Knox*, 222 Pa. St. 362; 71 Atl. 539; where a judgment of nonsuit was affirmed, the Court pointed out that the only evidence as to the facts of the occurrence was the testimony of the plaintiff himself, who testified that a few minutes before the collision he saw the defendant's horses standing in a private lane with a man standing at their head, and that when next he saw them they were running away in a public road some distance from where he had first seen them. There was no explanation whatever as to what had happened in the meantime. It was properly held that such evidence as there was, instead of affording any ground for an inference of negligence, affirmatively showed that the defendant had taken a reasonable precaution to prevent the happening of a runaway.

*O'Brien v. Miller*, 60 Conn. 214; 22 Atl. 544; is another case in which a judgment of nonsuit was affirmed. The plaintiff was run over by a horse belonging to the defendant which was being driven

by an employee of the defendant, but was running away and was beyond the control of its driver. There was no evidence as to what had caused the horse to run away, but it was proved that at the time when the horse struck the plaintiff the driver of the horse was exerting his utmost skill to prevent the horse doing any injury to the plaintiff. All that was said by the Court in that part of the opinion which is relied upon by counsel for the plaintiff in error in the case at bar was said in response to the untenable contention advanced by the plaintiff in that case, (upon which the Court said that his whole claim rested,) that the mere fact that the defendant's horse was running away, without any explanation, was in itself evidence from which the jury might find negligence. In another part of the opinion, however, the Court said (60 Conn. 217):

"If, however, it is claimed only that the fact of the horse running away affords a presumption of fact that there was negligence on the part of the defendants, then of course it must be taken in connection with the other facts. There is the fact that the horse had previously been frightened when near the cars and had become unmanageable. This fact is not of itself evidence of negligence, although it might call for increased care on the part of the driver. And then there is the fact proved that at the time of the collision the driver was exercising the highest care to prevent injury. This, so far from showing negligence, is positive evidence the other way."

The other cases relied upon by counsel for the plaintiff in error in this connection, including *Rowe*



v. *Such*, 134 Cal. 573, and also *Button v. Frink*, 51 Conn. 342, from which counsel have quoted on page 20 of their brief, may be grouped together.

The proposition involved in these cases is presented in a clean-cut form in *Creamer v. McIlvain*, 89 Md. 343; 43 Atl. 935. The facts of that case were as follows:

Two gentlemen of Baltimore were returning from a roadhouse to the city in a buggy drawn by a pair of spirited horses owned by one of them and being driven by the other, who had frequently driven them before. At a distance of half a mile from the roadhouse one of the horses became frightened at an electric car and jumped against the other, and the two started to run. About a quarter of a mile further on they ran into a vehicle which the appellants were driving, they also being on their way from the same roadhouse to Baltimore. There was no evidence of negligence in the management of the horses after they left the roadhouse. The complaint contained two counts, one predicated upon the theory of negligence, the other upon the theory that the injury complained of had been caused by the proneness of the horses to become uncontrollable, and that that quality of the horses had been fully known to the defendants before they started from the roadhouse. The trial Court directed a verdict for the defendants on each count, and the judgment was affirmed. There was no evidence in the case to support the theory of the second count any more than there was any evidence of negligence in the management of the horses.

So far as concerned the cause of action pleaded in the first count of the complaint in *Creamer v. McIlvain*, the facts of that case fully demonstrate the propriety of the rule there enforced. It is obvious that horses may and do run away, however carefully driven, and therefore, since it is a matter of common experience that a horse may be caused to run away by an infinite variety of causes other than negligence on the part of the person driving it, the mere fact that a horse, while being driven, runs away, there being no explanation as to what caused the horse to start running, affords no evidence of negligence on the part of its driver. When damage has been done by a runaway horse, in order to justify an inference of negligence in the management of the horse on the part of a person in charge of it, there must be at least some evidence of the circumstances under which the horse started to run. This is all that was decided in *Rowe v. Such*, 134 Cal. 573.

The distinction between inferring negligence from the mere fact that a horse is running away *with its driver* and inferring negligence in a case where the evidence discloses that a team of horses were running away *without a driver* was clearly pointed out in *Button v. Frink*, 51 Conn. 342. In such a situation the rule is just the opposite of the rule which applies when the only fact proven is that a horse was running away with its driver.

*McMahon v. Kelly*, 9 N. Y. S. 544.

## III.

AS TO THE SECOND AND FIFTH ASSIGNMENTS  
OF ERROR.

With regard to the contentions that the trial Court erred in refusing to direct a verdict for the defendant and in permitting judgment to be entered in favor of the plaintiff, it is sufficient to say that in whatever manner the evidence be analysed the most that counsel for the plaintiff in error can claim to have shown is that the evidence bearing upon the question of negligence was conflicting. They have not shown, and it is impossible to say, that there was no evidence of negligence on the part of any employee of the defendant.

The first and second grounds urged by counsel for the plaintiff in error in support of the second assignment of error are mere repetitions of the two contentions urged in support of the first assignment of error. It is obvious that the additional evidence introduced on the part of the defendant, consisting of testimony of the employees of the defendant, did not wipe out the testimony previously introduced on the part of the plaintiff, and at the most left the evidence conflicting on all points covered by the testimony on the part of the plaintiff.

The third ground urged in support of the second assignment of error is predicated upon a certain ordinance of the City of Oakland introduced in evidence by the defendant, and upon the contention that at the time when the horses ran away they were fastened



in strict accordance with said ordinance. The ordinance referred to requires that where a team of horses are not otherwise securely hitched, as to a post or other suitable fastening, the brake must be set, "and the lines or reins so fastened that the wagon cannot be drawn forward . . . except by means of the lines or reins".

It is questionable whether, even assuming the testimony of the employees of the defendant to have been true, the manner of fastening the reins to which they testified constituted a compliance with the ordinance in question, because all that they testified to was that the reins were tied back to a rod at the back of the seat, the driver, Crow, testifying that they were pulled back "pretty tight". It is obvious that if the reins had been fastened back, as required by the ordinance, so that the wagon could not have been drawn forward except by means of the reins, it would have been a physical impossibility for the horses to drag the wagon for any considerable distance, and all the more so if the brake had been set as required by the ordinance, and therefore it would seem that in any view of the testimony the ordinance was not complied with. But, waiving the question whether or not the testimony of the employees of the defendant, even assuming that testimony to have been true, showed a compliance with the ordinance referred to, certainly the jury were justified in taking into consideration, as negating that testimony, the undisputed facts that the horses did run away, and did drag the wagon half the length of a city block, and that they were stopped only by

running into a building. The jury were also justified in taking into consideration the conflicting statements of the different witnesses as to whether or not the wheels were dragging, and more particularly the fumbling attempts of the driver, Crow, to explain what he had done with the reins, and how it happened that, if they were securely fastened as required by the ordinance, and as claimed by him and his fellow employees, one of them came loose. We submit that the assumption that the evidence showed without contradiction that the ordinance referred to had been complied with is an assumption without any warrant in the record.

Furthermore, the argument of counsel for the plaintiff in error on this point involves the fallacy of assuming that the only possible theory on which the defendant could be charged with negligence is that the horses had not been properly fastened. There was considerable evidence before the jury to the effect that, regardless of whether or not the horses had been fastened in the manner prescribed by the ordinance referred to, the real cause of their running away was negligence on the part of the driver, Crow, either in the manner of his approaching the team immediately before they ran away, or in the manner in which he handled the reins after he had approached the team. He himself attempted to explain his conduct in these particulars, but there was also testimony to which the jury were justified in giving consideration, with regard to statements made by him shortly after

the accident, which were altogether inconsistent with his testimony at the trial.

#### IV.

##### AS TO THE THIRD ASSIGNMENT OF ERROR.

The objection to the instruction complained of in the third assignment of error is predicated upon two grounds, each of which is based upon an assumption not warranted by the record.

The first of these grounds is merely a repetition of the first contention urged in support of the first assignment of error, namely, that the evidence conclusively proved that the management and control of the team had been delivered to Thun. We contend that the evidence proved the contrary, but we submit that there was at least some evidence from which the jury could justifiably find that up to the time when the horses ran away the defendant had not yet parted with the management and control of them. The jury were not instructed that the defendant did have control of the horses. The question whether the control of them had been turned over to Thun was explicitly submitted to the jury in another part of the instructions. (Printed Transcript, pp. 116, 119-120.) The second ground of objection urged against the instruction complained of in the third assignment of error assumes that the evidence conclusively proved that the horses were fastened in accordance with the city ordinance heretofore discussed, whereas, as we have shown, there was very persuasive evidence to the effect that the horses had not been so fastened.



## AS TO THE FOURTH ASSIGNMENT OF ERROR.

The instruction requested by the defendant, which is recited in the fourth assignment of error, was properly refused. The request for that instruction seems to have been predicated upon the theory that, if the ordinance referred to was complied with, that fact precluded any possible inquiry as to whether the defendant had been negligent in the matter of fastening the horses. There is no principle or rule of law which would support any such theory. The defendant was allowed to introduce the ordinance in order that, as explained at the time by its counsel, the jury might have a basis for determining whether the defendant had been negligent in regard to the method adopted of fastening the horses. (Printed Transcript, pp. 106-7.) That was the utmost extent to which the ordinance could properly be considered as bearing upon the question of negligence. Failure to comply with the ordinance in any situation to which the ordinance applied would doubtless give rise to a presumption of negligence, but there is no principle or rule of law to the effect that compliance with any such statutory requirement necessarily negatives negligence even in regard to the subject-matter of such requirement. The correct principle is stated in *Farrell v. Waterbury Horse R. R. Co.*, 60 Conn. 239, 247; 21 Atl. 675, 676; as follows:

“Where the law itself prescribes and defines beforehand the precise, specific, conduct required under given circumstances, the standard by which

such conduct is to be judged is found in the law. When, in such a case, the conduct has been ascertained, the law, through the court, determines whether the conduct comes up to the standard. The rules of the road, some of the rules of navigation, and the law requiring the sounding of the whistle or the ringing of the bell of a locomotive approaching a grade crossing, at a specified distance therefrom, may serve as instances of this kind. Of course, if, in cases of this kind, one of the parties injures another, he is not necessarily absolved from blame by showing a compliance with the specific rule of law, for it may be that while so doing he neglected other duties which the law imposed upon him."

## VI.

We submit that no sufficient ground has been shown for disturbing the verdict, and that the judgment of the United States District Court should be affirmed.

Respectfully submitted,

HARRISON & HARRISON,  
 BYRON F. STONE, JR.,  
 STANLEY MOORE,  
 Attorneys for Defendant in Error.

No. 2620.

---

---

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

---

THE SAN FRANCISCO BREWERIES, Ltd.,  
a corporation,

*Plaintiff in Error,*

VS.

SYLVIA A. BRAINARD,

*Defendant in Error.*

---

**SUPPLEMENT TO  
BRIEF FOR DEFENDANT IN ERROR**

---

HARRISON & HARRISON,  
BYRON F. STONE, JR.,  
STANLEY MOORE,

Attorneys for Defendant in Error.

---

*Filed this.....day of November, 1915.*

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

---

---





No. 2620.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

---

THE SAN FRANCISCO BREWERIES, Ltd.,  
a corporation,

*Plaintiff in Error,*

VS.

SYLVIA A. BRAINARD,

*Defendant in Error.*

---

## SUPPLEMENT TO BRIEF FOR DEFENDANT IN ERROR

Our attention has been called to the fact that neither of the briefs heretofore filed in the above-entitled case contains any statement of facts as required by subdivision 2 of Rule 24 of this Court. For the purpose of supplying this defect we submit the following statement of facts:

This is an action to recover damages for personal injuries sustained by the defendant in error on May 29, 1914, by being knocked down and trampled upon at the corner of Twentieth Street and Broadway in the City of Oakland by two horses which were running away, drawing after them a brewery wagon owned by the plaintiff in error. The answer denies

that said injuries were caused by any negligence on the part of the plaintiff in error or on the part of any of its employees.

The plaintiff in error is a corporation owning a number of breweries, one of which, known as the John Wieland Brewery, has a place of business on the west side of Broadway between Nineteenth and Twentieth Streets in the City of Oakland. (Transcript, pp. 70, 65.) Exhibit A is a diagram of said premises, (Transcript, pp. 62-3,) and Exhibits 1, 2, and 3, are photographs showing the appearance of said premises viewed from Broadway. (Transcript, p. 35.) Said premises have two entrances from Broadway, each about 10 feet wide. At the rear is a barn or stable. Inside the property line a driveway extends from each of the entrances to the barn or stable so that a wagon can go in by one entrance and out by the other. Along that part of the driveway extending from the northernmost of the two entrances back to the barn or stable there is on the right hand side as one enters from Broadway a building used for various purposes, the front portion being an office and the rear portion a bottling-house. From the bottling-house two doors open on the driveway, each having in front of it a loading platform. From the office one door opens on the driveway and one on Broadway. The office also has a window opening on the driveway. (Transcript, pp. 62-3.)

The horses which knocked down the defendant in error were owned by one Charles Thun, from whom the plaintiff in error had hired them for the day.



(Transcript, pp. 34, 65.) Thun took them to the brewery shortly after 7 o'clock in the morning and left them there in charge of employees of the plaintiff in error. (Transcript, pp. 34, 41, 71, 79, 91.) They were used during the day in drawing a wagon owned by the plaintiff in error. (Transcript, pp. 25, 91-2, 97.) In the course of the afternoon Thun was notified by telephone that the horses would not be wanted for the following day, and was told to call for them at half past five o'clock. (Transcript, pp. 34, 66.) Accordingly, at about half past five o'clock, or shortly before, he went to the brewery to fetch them. (Transcript, pp. 34, 72, 80.)

When he arrived at the brewery the horses were standing in the northernmost of the two driveways about 20 or 30 feet back from the street entrance and facing toward it. The door was open. The horses were still hitched to the wagon. (Transcript, pp. 34-5.) They had been brought back to the brewery shortly after 4 o'clock by Harry Crow, the man who drove them during the day, (Transcript, p. 92) and had remained standing where they were when Thun arrived ever since Crow had brought them back to the brewery after completing his route. (Transcript, pp. 79-80, 92.)

Postponing for the time being any attempt to state the facts with regard to which there is any room for discussion, the undisputed circumstances immediately preceding the knocking down of the defendant in error at the corner of Twentieth Street and Broadway were that at about 5:30 p. m. or shortly thereafter the

horses emerged from the northernmost entrance of said premises of the plaintiff in error, running away without any driver, and drawing after them the wagon to which since morning they had been hitched, and that on reaching the pavement of Broadway they turned toward Twentieth Street, and continued running until they dashed against a building at the northwest corner of those two streets, overtaking the defendant in error while she was attempting to find a place of safety. (Transcript, pp. 39, 46-8, 59-60, 66-7, 69, 72-4.)

The main controversy in the case is as to what happened during the brief interval between Thun's arrival at the brewery and the time when the horses escaped from the premises, running away without a driver. There is also a question as to just what conversation took place between Thun and the manager of the plaintiff in error at the time when the horses were hired on May 28th, and also as to what conversation took place between Thun and certain employees of the plaintiff in error on May 29th at the time when the horses were left at the brewery in the morning.

Thun testified that when he was asked to rent the team he informed the person with whom he talked on that occasion that it was "a lively team." (Transcript, p. 42.) He also testified that when he delivered the team at the brewery on May 29th in the morning he informed the three men whom he found there at work that the team had done nothing for a couple of days and ought to be handled carefully. (Transcript, pp. 34, 42-3.) It was admitted by the several employees



of plaintiff in error that at the time when the horses were brought to the brewery in the morning one of them had a halter on under his bridle, and that there was some conversation about the character of the horses, and as to the advisability of being more than usually careful in driving them. (Transcript, pp. 73, 76, 79, 86, 96-7.) Crow also admitted that while driving the team during the day he had observed one of the horses to be a good free horse, right on the bit all the time, "would have gone if you had let him go," and he was unwilling to deny that he had stated in explanation of the accident shortly after it occurred that one of the horses was a bad horse and had tried several times during the day to run away. (Transcript, pp. 97-8.)

Upon arriving at the brewery Thun entered by the southern doorway and walked all the way to the rear of the premises, where a horse with a lame foot was occupying the attention of three employees of the plaintiff in error, two of whom, Cooper and McKinnon, were engaged in "doctoring" it, while Crow was looking on. (Transcript, pp. 72, 79-80, 106.) As Thun approached the group, Cooper said to him, "There's your team, it is ready for you," or made some equivalent remark. (Transcript, pp. 43, 93.) Thun did not immediately do anything toward taking his horses away. He first stood for a couple of minutes, watching the operation on the lame horse, (Transcript, pp. 44, 80) and then for another few minutes, perhaps six or seven minutes, sat on the platform before the rear door of the bottling-house, engaged in conversation with Crow. (Transcript, pp. 80, 93.)



While Crow and Thun were conversing, McKinnon went to the office at the front of the premises (Transcript, p. 72,) leaving Cooper alone with the lame horse. (Transcript, p. 80.) After an interval Thun remarked to Crow, "I guess I'll have to unhitch and go home." (Transcript, pp. 44, 80, 93.) To which Crow made a reply, the words of which are reported differently by the witnesses. Cooper says that Crow said, "Well to show you I am a good fellow, I'll help you unhitch." (Transcript, p. 80.) Crow says that he said, "All right, I have been driving them all day, and I will come and help you unhitch them." (Transcript, pp. 93-4.) Thun says that what Crow said was: "I'll unhitch them for you." (Transcript, pp. 44-5.)

Thereupon Crow and Thun walked toward the team, Thun slightly in the lead. (Transcript, pp. 80, 94.) The place where the horses were standing was near the door leading from the driveway into the office, the hind wheels of the wagon being opposite to the door. (Transcript, pp. 45, 88-90, 92-3.) As a preliminary to doing anything about taking the horses home, Thun started to go to the office for the purpose of collecting the money due him for their hire. (Transcript, p. 36.) In order to reach the door leading to the office he passed behind the wagon and to the left of it, (Transcript, pp. 37, 45, 94,) Crow proceeding at the same time on the right hand side of the wagon toward the horses. (Transcript, pp. 36, 37.)

Just as Thun reached the threshold of the door leading to the office something induced him to turn

around, and he then saw that the team had already started to run toward the street. He did not see the team start to run, and did not see where Crow was, or what he was doing, when the team started. When Thun first "got a good look" the wagon was disappearing through the street entrance and Crow was lying on the sidewalk just outside, as though he either had fallen or had been knocked over. Thun ran after the team but could not run as fast as they did. (Transcript, pp. 37-9, 46.)

At the time when the motion for a nonsuit was made no evidence had been introduced tending in any way to show that any attempt had been made by Crow to see that the team was properly fastened or was fastened at all while standing in the driveway facing the open doorway leading out to Broadway. On the contrary the testimony of Thun was that when he saw the wagon going out through the doorway, and afterwards when he saw it proceeding along Broadway toward Twentieth street, the hind wheels were turning around. (Transcript, pp. 40-41.) He was unable to testify as to whether the reins were or had been fastened in any manner, but it was in evidence that the horses were going at a full gallop after they left the premises of the plaintiff in error. (Transcript, pp. 39, 59.)

On the part of the plaintiff in error testimony was introduced to the effect that the brake had been set; (Transcript, pp. 67, 80, 83, 87-8, 90, 93;) but McKinnon, the only witness who had been quite close to the wheels of the wagon after the horses had reached the street, and while they were running away, was un-

able to say whether the wheels at that time were dragging or not. (Transcript, p. 74.)

As to what Crow was doing at the time when the horses started to run, there was practically no evidence other than his own testimony and such inferences as the jury might justifiably draw both from that testimony and from what it left untold. Thun was on the other side of the wagon and could not see Crow. McKinnon was inside the office talking with the manager. (Transcript, p. 72.) Cooper was engaged with the lame horse at the rear of the premises. (Transcript, p. 80.) He testified as follows:

“When I first noticed the team in motion, Mr. Crow was just stepping up, grabbing, reaching for the lines, stepping on to the step of the wagon; it was all done so quick I do not know whether his feet were touching the step or not, but he did have it afterwards, because he got the line and I seen him dragged on to the sidewalk. When he went out on the sidewalk he was on his back dragging.” (Transcript, p. 82.)

The explanation which Crow gave was as follows (Transcript, p. 94):

“He (Thun) went on the left-hand side of the wagon and I went on the right-hand side. \* \* \* All at once the horses started to go and I made a jump on the step and grabbed for the lines, and I caught one line, and they dragged me through the doorway. \* \* \* Just as I got to the step there was something started them. Then I made a grab for the lines and jumped on the step to get hold of the line; the brake was still on and the lines were still fast. I got only one line. I hung on to the line to the curb, about fifty feet. \* \* \* The reason I dropped it was I could



not hold on any longer; they were turning to the left and they would run over me and I had to let go of the lines; they hurt me as it was."

Further attempts by Crow to explain what happened will be found on pages 98-100, and 102-5.

He admitted, however, that he had testified on the trial of another action involving the same transaction that before the horses started to run he had got up on the step of the wagon for the purpose of untying the lines from the seat, and that on that occasion he had attempted in his testimony to justify his action in attempting to untie the reins before unhitching the tugs upon the ground that that was the only proper method of handling a team under such circumstances. (Transcript, pp. 99-100.) Also, there was testimony to the effect that about a week after the runaway Crow had stated to a police inspector of the City of Oakland that when he walked up to the team before they ran away he stepped up and got the lines from where they were attached to the seat, and that *then* the team started to run. (Transcript, pp. 107-8.) Furthermore, Thun testified that after the accident was over he went back to the brewery, and at that time heard Crow say to one of the other employees of the plaintiff in error that he had dropped one of the lines. (Transcript, pp. 109-110.) It is true that Cooper and McKinnon testified that they had not heard Crow make any such statement, but they testified at the same time that after the accident no one said anything at all about it,—a statement so obviously unbelievable as to discredit all the rest of their testimony. (Transcript, pp. 110-112.)

Upon the question whether the reins were properly fastened back, during the interval when the horses were standing in the driveway facing the open doorway leading out to Broadway, the evidence was conflicting. There was testimony to the effect that the reins were in fact fastened to the seat of the wagon, but at the same time the jury could justifiably infer from the testimony as a whole either that the reins although in some manner fastened to the seat had not been properly fastened or that if at first so fastened they had been negligently unfastened or loosened by Crow after Thun had started toward the office.

Aside from the testimony of Crow, which was confused and indefinite, the only testimony as to the fastening of the reins was that of McKinnon and Cooper. The former testified that after the accident he found one of the reins tied to a rod at the back of the seat, (Transcript, pp. 73, 77) but obviously not tied back sufficiently so that the wagon could not be drawn forward except by the reins. Cooper testified that on one or more of his visits to the bottling-house to get a drink after Crow had brought the team in he saw the reins tied back, (Transcript, pp. 80, 82-3, 84-9) but it was evident that he had had no opportunity for more than a casual observation.

Crow's testimony as to what he did with the lines was as follows (Transcript, p. 93):

"There were no rings on the lines and there is a rail on the back of the seat; I just tied a loop right there with the lines, like you would tie a bow knot and put the lines through and pulled them through like this (illustrating); the brakes

were set, the lines were pulled back about the same as the rings would set them, pretty tight."

He was unable to explain how it was that if, as he testified, he had tied the reins in a single knot he could get one of them loose without untying the other. (Page 95.) All that he could suggest was that they were extraordinarily long reins, 2 or 3 feet longer than the reins to which he was accustomed; that there was no buckle on them, so that both ends were loose; and that the part which he caught must have been one of the loose ends hanging down from the seat. (Pp. 103-4, 105.)

---

We submit that the testimony in the case at bar presented precisely the kind of case to which the rule laid down in the decisions heretofore cited is peculiarly applicable; and that in view of all the circumstances it was essentially a question proper to submit to the jury, whether the cause of the injuries sustained by the defendant in error was or was not negligence on the part of Harry Crow.

A discussion of the underlying principle involved in any such case will be found in Beven on Negligence in Law (1908 edition), beginning at p. 115. To the cases there cited we would add *Strupp v. Edens*, 22 Wis. 432; and *Cincinnati etc. Ry. Co. v. South Fork Coal Co.*, 71 C. C. A. 316; 139 F. 528.

We desire to add that we do not claim at all that the plaintiff in error ought to be held liable upon the principle upon which the owner of a vicious animal



is held responsible for damage done by such animal. The authorities cited on pages 22 to 27 of the opening brief for plaintiff in error, (with the exception of *Garlick v. Dorsey*, 48 Ala. 220,) deal with a proposition not involved in this case.

As is expressly pointed out in *Finney v. Curtis*, 78 Cal. 498, 502, one of the cases relied upon by counsel for plaintiff in error, there are two separate and distinct grounds upon which the owner of an animal may be liable for damage done by such animal, one of the grounds being negligence in permitting a vicious animal to exercise his vicious propensities, (which kind of negligence is not shown to exist without evidence that the animal in question was in fact vicious and that the owner knew that fact,) and the other ground of liability being, as stated in *Finney v. Curtis*, that the animal "was so negligently handled by the owner as to cause the injury." (See also *Gary v. Arnold*, 175 Ill. App. 365.)

With regard to the testimony introduced in the case at bar to the effect that Crow was notified in the morning before he took the team out of the brewery that it was a free team, and a lively team, and the testimony of Crow himself as to what he had observed while driving the team during the day, what we claim is that the circumstances established by that testimony were circumstances which, as in the case of *O'Brien v. Miller*, 60 Conn. 214, 217, ought to have been notice to the driver that more than ordinary care was called for on his part to prevent the happening of a runaway.

We cite *Crawford v. Upper*, 16 Ontario Appeal Reports 440, (1889) as a case involving a claim for damages caused by a runaway horse, in which there was far less evidence as to what caused the horse to run, but in which nevertheless it was held error to order a nonsuit. See also *Whitney v. Ritz*, 151 N. W. 762.

Respectfully submitted,

HARRISON & HARRISON,  
BYRON F. STONE, JR.,  
STANLEY MOORE,

Attorneys for defendant in error.



















